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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,

Petitioner,

v.

WILLIAM R. BROCK, SECRETARY OF LABOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Question Presented

Whether an entity created by interstate compact and exempt from all taxes and assessments and most regulations as a matter of federal law may properly be held liable to pay assessments levied by the District of Columbia into a "Special Fund" created by the D.C. Worker's Compensation Act to benefit certain D.C. employees.

The Parties

The petitioner Washington Metropolitan Area Transit Authority was the defendant in the United States District Court and the appellant in the United States Court of Appeals for the District of Columbia Circuit. Respondent William R. Brock, Secretary of Labor (as successor to Raymond J. Donovan), was the plaintiff in the District Court and the appellee in the Court of Appeals.

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Petitioner, Washington Metropolitan Area Transit Authority [hereinafter cited as WMATA], respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceedings.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia is not yet officially reported but is unofficially reported at 796 F.2d 481 (D.C. Cir. 1986), and is reprinted in the Appendix at p. 1a, *infra*. The memorandum decision of the United States District Court for the District of Columbia (Parker, J.) is reported at *Donovan v. WMATA*, 614 F. Supp. 1419 (D.D.C. 1985). It is reprinted in the Appendix hereto at p. 21a, *infra*.

Jurisdiction

Invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1345 (1982), Respondent brought this suit in the United States District Court for the District of Columbia. On July 19, 1985, the District Court denied petitioners' motion for summary judgment and granted judgment to respondent. *See* p. 21a, *infra*.

On petitioner's appeal, the United States Court of Appeals for the District of Columbia Circuit issued an opinion on July 18, 1986, affirming the order of the District Court. *See* p. 1a, *infra*. Petitioner's timely petition for rehearing was denied on October 2, 1986. *See* 19a, *infra*. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1982).

Relevant Statutes

The Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), *codified at* D.C. Code Ann. § 1-2431 (1981), provides in part:

Exemption from Regulation

77. Except as otherwise provided in this Title, any transit service rendered by transit facilities owned or controlled by the Authority and the Authority or any corporation, firm or association performing such transit service pursuant to an operating contract with the Authority, shall, in connection with the performance of such service, be exempt from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and persons, except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect; provided, however, that the Board may promulgate regulations for the safety of the public and employees not inconsistent with the applicable laws, rules, regulations or orders of the signatories and of the United States.

Tax Exemption

78. It is hereby declared that the creation of the Authority and the carrying out of the corporate purposes of the Authority is in all respects for the benefit of the people of the signatory states and is for a public purpose and that the Authority and the Board will be performing an essential governmental function, including, without limitation, proprietary, governmental and other functions, in the exercise of the powers conferred by this Title. Accordingly, the Authority and the Board shall not be required to pay taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision or upon its activities in the operation and maintenance of any transit facilities or upon any revenues therefrom and the property and

> income derived therefrom shall be exempt from all federal, State, District of Columbia, municipal and local taxation. This exemption shall include, without limitation, all motor vehicle license fees, sales taxes and motor fuel taxes.
>
> Liability for Contracts and Torts
>
> 80. The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

Section 5(a) of the WMATA Compact consent legislation, *codified at* D.C. Code Ann. § 1-2440 (1981) provides:

> 1-2440. Amendment of laws and reorganization plans.
>
> All laws or parts of laws of the United States and the District of Columbia inconsistent with the provisions of Title III are hereby amended for the purpose of this subchapter to the extent necessary to eliminate such inconsistencies and to carry out the provisions of this subchapter and Title III and all laws or parts of laws and all reorganization plans of the United States are hereby amended and made applicable for the purpose of this subchapter to the extent necessary to

carry out the provisions of this subchapter and Title III.

Section 44 of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 944 (1982), provides:

Special Fund

Sec. 44. (a) There is hereby established in the Treasury of the United States a special fund. Such fund shall be administered by the Secretary. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be money or property of the United States.

(b) The Treasurer is authorized to disburse moneys from such fund only upon order of the Secretary. He shall be required to give bond in an amount to be fixed and with securities to be approved by the Secretary of the Treasury and Comptroller General of the United States conditioned upon the faithful performance of his duty as custodian of such fund.

(c) Payments into such fund shall be made as follows:

(1) Whenever the Secretary determines that there is no person entitled under this Act to compensation for the death of an employee which would otherwise be compensable under this Act, the appropriate employer shall pay $5,000 as compensation for the death of such an employee.

(2) At the beginning of each calendar year the Secretary shall estimate the probable expenses of the fund during that calendar year and each carrier or self-insurer shall make

payments into the fund on a prorated assessment by the Secretary in the proportion that the total compensation and medical payments made on risks covered by this chapter by each carrier and self-insurer bears to the total of such payments made by all carriers and self-insurers under the chapter in the prior calendar year in accordance with a formula and schedule to be determined from time to time by the Secretary to maintain adequate reserves in the fund.

(3) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

(d) (1) For the purpose of making rules, regulations, and determinations under this section and for providing enforcement thereof, the Secretary may investigate and gather appropriate data from each carrier and self-insurer. For that purpose, the Secretary may enter and inspect such places and records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate.

(2) Each carrier and self-insurer shall make, keep, and preserve such records, and make such reports and provide such additional information, as prescribed by regulation or order of the Secretary, as the Secretary deems necessary or appropriate to carry out his responsibilities under this section.

(3) For the purpose of any hearing or investigation related to determinations or the enforcement of the provisions of this section, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses

and the production of books, papers, and documents), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary of Labor.

(e) There is hereby authorized to be appropriated to the Secretary the sum of $2,000,000 which the Secretary shall immediately deposit into the fund. Upon deposit in the fund such moneys shall be treated as the property of such fund. This sum, without additional payments for interest, shall be repaid from the money or property belonging to the fund on a schedule of repayment set by the Secretary: Provided, that full repayment must be made no later than five years from the date of deposit into the fund. Each such repayment, as made, shall be covered into the Treasury of the United States as miscellaneous receipts.

(f) The Treasurer of the United States shall deposit any moneys paid into such fund into such depository banks as the Secretary may designate and may invest any portion of the funds which, in the opinion of the Secretary, is not needed for current requirements, in bonds or notes of the United States or of any Federal land bank.

(g) Neither the United States nor the Secretary shall be liable in respect of payments authorized under section 908 of this title in an amount greater than the money or property deposited in or belonging to such fund.

(h) The Comptroller General of the United States shall audit the account for such fund, but the action of the Secretary in making payments from such fund shall be final and not subject to review, and the Comptroller General is authorized and directed to allow credit in the accounts of any disbursing officer of the Secretary for payments

made from such fund authorized by the Secretary.

(i) All civil penalties provided for in this chapter shall be collected by civil suit brought by the Secretary.

(j) The proceeds of this fund shall be available for payments:

(1) Pursuant to section 910 and 911 of this title with respect to initial and subsequent annual adjustments in compensation for total permanent disability or death which occurred prior to the effective date of this subsection.

(2) Under section 908(f) and (g), under section 918(b), and under section 939(c) of this title.

(3) To repay the sums deposited in the fund pursuant to subsection (d) of this section.

(4) To defray the expense of making examinations as provided in section 907 of this title.

(k) At the close of each fiscal year the Secretary shall submit to the Congress a complete audit of the fund.

Statement of the Case

This case arose when WMATA informed the Secretary of Labor, acting as agent for the District of Columbia, that WMATA was not liable for assessments to the Special Fund created by 33 U.S.C. § 944(c) as part of the Longshoremen's and Harbor Workers' Compensation Act [hereinafter cited as LHWCA], 33 U.S.C. §§ 901-950, and administered by the Department of Labor, because the assessment constituted a tax precluded by Section 78 of

the WMATA Compact. The Secretary of Labor initiated this action alleging that the Special Fund assessments are part of WMATA's workers' compensation obligation and not a tax. The Court of Appeals for the District of Columbia Circuit affirmed the district court's decision that although WMATA is tax-exempt, it is not immunized from the obligation to pay an annual assessment into the D.C. Special Fund. The Court of Appeals characterized the assessment as both a user fee and a fee imposed as an incident to lawful regulation and held that the tax exemption provided by WMATA's Compact did not reach such assessments. In reaching its decision, the Court of Appeals relied in part on revised estimates of assessments for and payments from the Special Fund that were provided by the Secretary of Labor only on appeal.

The District of Columbia Workmen's Compensation Act of 1928 [hereinafter cited as DCWCA or the Act], Pub. L. No. 70-419, 45 Stat. 600 (1928), applied the workers' compensation provisions of LHWCA to employees in the District of Columbia until July 26, 1982, when DCWCA was replaced by new legislation applicable only to the District of Columbia [hereinafter cited as the New Act], D.C. Code Ann. § 36-301 *et seq.* (Supp. 1984). The New Act governs liability for employment-related injuries suffered after July 26, 1982, but D.C. employers continue to be liable for payments under DCWCA for injuries previously suffered by employees.

In 1972 the LHWCA, and therefore the DCWCA, was amended to create the so-called "second injury fund" or "Special Fund" in its present form. The revision was intended to encourage employers to hire handicapped workers by limiting their compensation liability for subsequent or "second" injuries. Compensation for second injuries in excess of the employer's limit is paid from the Special Fund. The Special Fund is financed primarily by assessments upon insurance carriers and self-insurers. It pays for (1) certain medical examinations; (2) claims against in-

solvent employers; (3) compensation inflation adjustments relating to pre-1972 injuries; (4) vocational rehabilitation costs; and (5) payments for "second" injuries. Under the statute, each year the Secretary estimates the probable expenses of the fund during that calendar year and each carrier or self-insurer makes payments into the fund on a prorated assessment "in the proportion that the total compensation and medical payments made on risks covered by this chapter by each carrier and self-insurer bears to the total of such payments made by all carriers and self-insurers under the chapter in the prior calendar year." 33 U.S.C. § 944(c)(2).

WMATA is a government agency created in 1966 by a Compact among the District of Columbia, Virginia and Maryland, with the consent and active participation of Congress. Extensive hearings were held in both houses of Congress prior to enactment of the Compact, which is the governing law of WMATA. Under Section 2 of the Compact, WMATA is charged with the construction and operation of a rapid transit rail system (Metrorail) and operation of the bus system in the District of Columbia and surrounding metropolitan area. Section 78 of the Compact expressly grants WMATA broad immunity from all taxation, on the grounds that the "carrying out of the corporate purposes of the Authority is in all respects for the benefit of the people of the signatory states and is for a public purpose." The House and Senate Committee reports both described the tax exemption in the following terms: "the property, activities, and revenues of the Authority and of the Board shall be exempt from all Federal, State, District of Columbia, municipal, and local taxation." H. R. Rep. No. 1914, 89th Cong., 2d Sess. at 18 (1966); S. Rep. No. 1941, 89th Cong., 2d Sess. at 19 (1966). A broad tax exemption was particularly important to Congress and the signatories because the construction of WMATA's rapid rail system was financed in large part by bonds guaranteed by the federal government. In 1966,

when it was not envisioned that WMATA would operate the transportation system, it was thought that the payment of any federal or local taxes or assessments would simply increase the burdens of bond repayment on the general public. The necessity for a broad tax exemption became even greater when WMATA became an operating agency, as it is today, with almost fifty percent of its operations financed by subsidies paid by its component jurisdictions and the federal government.

WMATA's experience under LHWCA as extended by DCWCA began in January 1973, when WMATA assumed ownership and control of the then privately owned bus companies in the Washington metropolitan area. Pursuant to Section 80 of the WMATA Compact, WMATA is liable for torts arising out of its proprietary functions under the applicable signatory law. Thus, WMATA was an employer in the District of Columbia for workers' compensation claims arising out of its proprietary functions and therefore was subject to DCWCA until the new D. C. Workers' Compensation Act went into effect. As this Court has previously noted, WMATA has qualified as a self-insurer under Section 32(a)(2) of LHWCA, 33 U.S.C. § 932(a)(2). *WMATA v. Johnson*, 467 U.S. 925, 929 n.7 (1984).

The Special Fund assessments are separate from the basic workmen's compensation scheme. As the Court of Appeals stated, Special Fund assessments are placed in a special account and are not part of the general funds of the Treasury. Payments under the fund are made by the Department of Labor, and not, as is the case under workers' compensation, by the self-insurer or carrier directly to the injured worker.

The record below established clearly that WMATA's assessment for the fund each year was considerably greater than the benefit it received from second injury payments to WMATA employees. This imbalance results from the formula used to compute the assessment. Similiar to the

unemployment compensation tax, the assessment formula is based on each self-insurer or carrier's payments to its own employees or insureds who receive payments under DCWCA generally and *not* on any particular employer's experience with the Special Fund itself. Further, since all liability for the Special Fund hinges on the continued existence of pre-1982 DCWCA obligations, carriers or self-insurers may "opt out" of the Special Fund altogether—even though their employees continue to receive benefits from the Fund—simply by settling all pre-1982 workers' compensation claims they have been paying. By settling all their basic workers' compensation claims, employers may continue to benefit from the Special Fund with respect to their employees without paying any assessment at all. Thus, the number of carriers and self-insurers subject to assessment constantly shrinks, while the potential liability of the Special Fund, and therefore the assessment burden on the remaining employers and insurance carriers making payments under DCWCA, grows rapidly.[1]

As the Court of Appeals noted, WMATA can never benefit from two components of the Fund's expenditures. At least eight percent of the Fund's payouts are adjustment payments for workers disabled before 1972, and WMATA did not even become subject to the DCWCA until 1973. In addition, an estimated two percent of the Fund's payments are made to workers who are owed compensation by insolvent employers or insurers, and by the terms

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[1] The record below provides ample evidence of this trend. *See, e.g.* App. I to Reply Brief for Appellant; *see also* Report to the Congress by the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending*, HRD-82-85, April 1, 1982, B-203632, which expressed concern about the "growth in compensation payments" and noted that "future liabilities of the Special Fund are unfunded and an insurance carrier representative estimated this liability to be in the hundreds of millions of dollars." *Id.* at 22. The GAO investigated the LHWCA Special Fund, which is essentially identical to the DCWCA Special Fund.

of the Compact, WMATA can never become insolvent. *Brock v. WMATA*, 796 F.2d 481, 486 n.8 (D.C. Cir. 1986).

On appeal, the Department of Labor asserted for the first time that the payments made to WMATA employees from the Special Fund have been substantially higher than the figures included in the trial court record. Without providing any basis for its new estimates, the Department claimed that although the direct payout from the Fund to WMATA employees had previously been projected as $190,000 for 1984, it was in fact *$446,000*. The Department's new estimates did not change WMATA's estimated assessment for the Special Fund for 1984, which was *$1,177,000*. For fiscal year 1985, the Department claimed that payments on behalf of WMATA employees from the Special Fund amounted to $504,668. Since WMATA's 1985 assessment would have been based on its 1984 payments made to employees under DCWCA, and since the number of self-insurers and carriers subject to DCWCA has been shrinking, WMATA's 1985 assessment would have been substantially higher than that for 1984 and even less related to WMATA's benefits from the Special Fund. Although the record with respect to actual assessments and payouts is far from complete, it does clearly show that WMATA's assessments, particularly as the number of employers and carriers in the Special Fund steadily decreases, are *not* reasonably related to any benefits received by WMATA from the Special Fund and in fact will cost the taxpayers of this region literally millions of dollars annually.

Section 77 of the Compact grants WMATA exemption from regulation by the signatories and the federal government, except for laws and regulations "relating to inspection of equipment and facilities, safety and testing." The courts have uniformly interpreted this exemption broadly to prevent unnecessary costs because of inconsistent and burdensome regulation by various governmental bodies, all of which costs would increase the burden

on the public treasury and could adversely affect WMATA's general financial standing. *See* 112 Cong. Rec. 25,682 (1966) (remarks of Reps. Celler and Poff); *see also Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986); *McKenna v. WMATA*, No. 85-1513 (D.D.C. June 30, 1986), *appeal docketed* No. 86-5539 (D.C. Cir. July 31, 1986); *Malone v. WMATA*, 622 F. Supp. 1422 (E.D. Va. 1985); *C. T. Hellmuth & Associates, Inc. v. WMATA*, 414 F. Supp. 408 (D. Md. 1976).

Further, WMATA is also an agent and instrumentality of the signatories and possesses their sovereign immunity. As the Court of Appeals noted in *Morris v. WMATA*, "Congress has power to legislate for the District of Columbia and to create an instrumentality that is immune from suit. Maryland and Virginia have immunity under the eleventh amendment and each can confer that immunity upon instrumentalities of the state." 781 F.2d at 219-20. The Special Fund assessments, if WMATA is held to be subject to them, will substantially impact the treasuries of the three signatories, two of which do not assess WMATA for payments into their own similar special funds.

The district court granted summary judgment to respondent on two grounds: the required contribution does not constitute taxation; and WMATA's exemption from taxation is not applicable to workmen's compensation contributions. It reasoned that contributions used to supply a specific fund which has a special purpose are not "taxes" within the meaning of the WMATA Compact. The court also held that WMATA's tax exemption is not so broad as to preclude all taxation of "property, activities or revenues." App. at 26a.

On appeal, the Court of Appeals reasoned that the Special Fund was part of the basic worker's compensation scheme and not a tax for purposes of Section 78 of the WMATA Compact, since DCWCA's primary purpose is "the regulation of liability for industrial accidents." App.

at 17a. Further, it held that the Special Fund assessments were, for purposes of the constitutional doctrine of state immunity from federal taxation, permissible user fees under *Massachusetts v. United States*, 435 U.S. 444 (1978). For this purpose, the Court held that the assessments do not discriminate against state functions; are structured to produce revenues that will not exceed costs; and are assessed according to a formula "by which the Secretary will collect from each employer a 'fair approximation' of the employer's share of the cost." App. at 18a.

REASONS FOR GRANTING THE WRIT

This Court has a vital role to play in the interpretation of interstate compacts such as the WMATA Compact. *Dyer v. Sims*, 341 U.S. 22, 28 (1951). Only this Court can determine the nature and scope of obligations between States arising out of such compacts. The decision below, by narrowly construing WMATA's tax exemption and ignoring its concomitant exemption from most regulation, threatens WMATA's future and subjects the signatories of the Compact to obligations to which they have not consented. If the decision of the Court of Appeals stands, the signatory jurisdictions will necessarily pay as part of their support of WMATA's operations some portion of WMATA's contribution into the Special Fund, although two of the Compact signatories, the State of Maryland and the Commonwealth of Virginia, have properly found WMATA to be a state agency and hence exempt from all but administrative support of their own similar funds.

Further, the determination that WMATA's tax exemption does not reach the DCWCA Special Fund has significant implications not only for WMATA's Compact but also for the doctrine of intergovernmental tax immunity. The Court of Appeals' artificial distinction between a tax and a user fee or regulatory fee does damage to the basic definition of a "tax" and defines "assessment" so narrowly as to make it meaningless. The extraordinarily narrow

definition of "assessment" violates the well-settled rule of statutory construction which requires courts to give meaning to every word of a statute. *Bowsher v. Merck & Co.*, 460 U.S. 824 (1983); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Finally, the underlying statute specifically describes payments for the DCWCA Special Fund as "assessments".[2] The payments fully satisfy all the usual criteria for an assessment and therefore, under the plain language of Section 78 of the Compact, need not be paid by WMATA.

I. This Court Should Correct An Erroneous Interpretation of An Important Interstate Compact.

This case presents the question of the proper interpretation of an interstate compact and the interrelationship of that interstate compact with federal and state laws. The court below gave precedence to DCWCA over the interstate compact which provides WMATA with an exemption from virtually all regulation and all taxation. To reach that result, the court erroneously construed the Special Fund assessments as user and regulatory fees, thereby excluding the assessments from the Compact exemption. But Section 78 was not intended by Congress and the other signatories to be read in isolation. Section 77 of the Compact exempts WMATA from compliance with virtually all federal and state regulation to protect WMATA from undue costs. Section 78 is the fiscal corollary to Section 77. Obviously, exposure to liability for taxes or assessments poses an even more direct threat to WMATA's ability to perform essential government functions than does inconsistent regulation.

In addition to mischaracterizing the nature of the Special Fund assessment, the lower courts did substantial harm

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[2] Insurance carriers and self-insurers are required by 33 U.S.C. § 944(c)(2) to pay into the Special Fund based on a "prorated assessment by the Secretary."

to the principles of interpretation of interstate compacts which have been enunciated by this Court. An interstate compact is a federal law whose construction is a federal question. *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). In *Texas v. New Mexico*, 462 U.S. 554 (1983), this Court described the analysis required to interpret an interstate compact. The Court refused to rewrite the Pecos River Compact to provide for a voting United States representative, emphasizing that "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Id.* at 564. Thus, any court dealing with an interstate compact must carefully analyze the terms of that compact as well as any competing federal laws to ensure that the requested relief is not inconsistent with the purpose and terms of the Compact. This Court should correct the error of the courts below in misconstruing the WMATA Compact.

The decision below is contrary to the express intent of Congress. The legislation consenting to the WMATA Compact expressly declared in Section 5 that the Compact is controlling in any conflict with another law:

> *All laws or parts of laws of the United States* and of the District of Columbia *inconsistent with the provisions of Title III are hereby amended* for the purpose of this subchapter to the extent necessary *to eliminate such inconsistencies* and to carry out the provisions of this subchapter and Title III [the Compact] . . . .

Pub. L. No. 89-774 § 5(a), *codified at* D.C. Code Ann. § 1-2440 (1981) (emphasis supplied).

This provision leaves no doubt that Congress impliedly amended the DCWCA Special Fund provisions to accord with the terms of the WMATA Compact. The Compact exempts WMATA from the Special Fund assessment either under section 77 (if the assessment is a regulatory fee) or under 78 (if the assessment is a "tax or assessment"). The

lower courts have therefore failed to construe DCWCA and the WMATA Compact in the manner intended by Congress. This important error in statutory construction should be corrected by this Court.

Finally, as the record below shows, the decision below will have a serious impact on the operating budget of WMATA. The assessment at issue is projected to rise steeply each year as employers and insurance carriers settle old claims. WMATA, as a public agency that pays all operating expenses from the farebox and public subsidy, is simply not in a position to make such a substantial capital outlay. Its only choice, unless this Court corrects the errors below, is to pay steadily higher assessments, in effect subsidizing private employers and insurance carriers who can settle their old DCWCA claims. Further, since the WMATA operating budget requires a subsidy payment from the signatory jurisdictions, the lower courts' ruling will force that subsidy payment to be larger than would otherwise be necessary for WMATA to continue providing mass transit services. *See Morris v. WMATA*, 781 F.2d at 225-26. This would result in Maryland and Virginia taxpayers subsidizing private employers within a foreign jurisdiction rather than simply supporting a public entity, WMATA, formed for their benefit. This is precisely the anomalous and unfair result Congress desired to avoid when it approved WMATA's tax-exempt status.

II. The Court Below Improperly Characterized the Assessment Paid Into the DCWCA As A Regulatory or A User Fee and Not A Tax.

By characterizing the Special Fund as a regulatory fee and dismissing the need to determine whether it was a tax as a "metaphysical exercise", the court below ignored not only the characteristics of the Special Fund but also the historical genesis of such funds and their place within each state's worker's compensation scheme. The fact that Congress established this Special Fund as part of the

Longshoremen's and Harbor Worker's Compensation Act, which because of the District of Columbia's status at the time applies to worker's compensation claims arising prior to D.C.'s enactment of the New Act, is essentially irrelevant to the determination of the Special Fund's nature. Such funds exist in every state. They are almost uniformly characterized as taxes or penalties and are not viewed as part of the basic workmen's compensation scheme.[3]

Second injury funds arose because handicapped workers were being discharged because they threatened too great a potential liability to employers. For example, if a man who had only one eye was hired and lost the remaining eye in an industrial accident, the employer was required to pay the entire compensation due to a blind man; a sum considerably greater than the amount payable to a man

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[3] *See, e.g.*, Alaska Stat. § 23.30.040 (1983) (percentage contribution required for each form of disability in addition to compensation to employee); Kan. Stat. Ann. §§ 44-510(a) (basic compensation on second permanent injury reduced by amount of compensation of first injury) and 44-566(a) (1981) (assessment to fund special fund); Ky. Rev. Stat. § 342.122 (1985) (tax to fund special fund); Md. Ann. Code art. 101, § 66 (Repl. Vol. 1985) (assessment to special fund to be "in addition to" employee compensation); Minn. Stat. §§ 176.101(4a) (basic compensation for second injury reduced by effect of preexisting disability) and 176.129(3) (1986) (pay 20% of compensation to special fund in addition to employee compensation); Mo. Ann. Stat. §§ 287.710, 287.715 (Vernon 1982) (tax to fund special fund); N.Y. Work. Comp. Law §§ 15(8)(c) (payment from special fund is "special additional compensation") and 15(8)(h) (McKinney 1985) (Special fund filled by assessment); N.C. Gen. Stat. § 97-40.1 (1986) (Special fund used to pay "additional compensation" and is funded by an assessment against all employers or insurers whose employees suffer a permanent partial disability); Okla. Stat. Ann. Article 85, §§ 22(7) (defines basic benefits), 171-72 (special compensation for physically impaired employees coming from special fund), and 173 (West 1985) (special fund filled by tax); and Va. Code § 65.1-139 (Repl. Vol. 1980) (Special fund filled by tax). Additionally, virtually every state requires a payment into the state's special fund where an employee dies in an industrial accident leaving no dependents. The absence of dependents eliminates any notion of compensation from the required Special Fund payments.

who lost one eye. Insurance premiums increased dramatically as a result, and employers either dismissed employees who posed an increased risk or required them as a condition of employment to waive worker's compensation attributable to pre-existing conditions. Professor Arthur Larson described the evolution of second injury funds as the public response to this problem.

> Second injury funds, which have been adopted in all but one state, Georgia, are the solution to this dilemma. The usual provision makes the employer ultimately liable only for the amount of disability attributable to the particular injury occurring in his employment, while the fund pays the difference between that amount and the total amounts to which the employee is entitled. . .

2 A. Larson, *The Law of Workmen's Compensation* § 59.31(a) at 10-394 (1982).

The Special Fund involved here is no different, and should not be treated differently. It was intended to encourage the employment of previously injured and handicapped workers by spreading the cost of their compensation for any subsequent injury among all employers. H.R. Rep. No. 1441, 92nd Cong., 2nd Sess. 8, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4705-6. The Department of Labor, in the preamble to its regulations promulgated to implement the Special Fund provision, described it as follows:

> This special fund was established to give effect to a congressional policy determination that, under certain circumstances, the employer of a particular employee should not be required to bear the entire burden of paying for the compensation benefits due that employee under the Act. Instead, a substantial portion of such burden should be borne by the industry generally. . .

20 C.F.R. § 702.144 (1986).

The DCWCA Special Fund makes three significant types of payments. "Second injury" payments, the largest component of payments made by the Special Fund, are made to previously injured employees after the employer has paid the first 104 weeks of compensation. In addition, the Special Fund supplements the payments to claimants permanently disabled prior to 1972 in order to offset the impact of inflation on those claimants. *See* LHWCA, 33 U.S.C. § 910(h). Prior to 1984 one-half of the cost of these benefits was paid out of general federal appropriations. 33 U.S.C. §§ 910(h), 944(c)(2). Finally, the Special Fund also pays benefits under Section 18(b) of LHWCA where a self-insured employer or insurance carrier is insolvent. These payments benefit the public generally and not self-insured employers who pay assessments into the fund.

The court below erroneously assumed that the Special Fund is closely linked to the basic worker's compensation responsibility. The Special Fund is, however, markedly different from basic worker's compensation. The Special Fund is financed differently; its benefits are paid differently; and it serves a different purpose. Contrary to the assumption below, it has no role as a substitute for tort responsibility. Sections 4 and 5 of LHWCA tie the immunity from tort liability which is the employer's return for payment of benefits only to the payment of basic worker's compensation benefits under Sections 7, 8 and 9 of the Act, and *not* to payment of Special Fund assessments under Section 44(c). *See* App. at 33a-38a. Similarly, there is nothing in Section 32(a) (the self-insurance provision) which suggests that payment of Special Fund assessments under Section 44(c) is a condition of being self-insured.

Special Funds in other states are similar to that created under LHWCA, both in structure and in purpose. *See* 2 A. Larson, *The Law of Workmen's Compensation*, §§ 59.31(a), 59.34 (1982). Methods of financing these funds vary from state to state, but all of them are treated as separate and apart from the basic worker's compensation

scheme. "The funds are usually built up by a charge against carriers in cases of death without dependants; sometimes there are special appropriations; sometimes a small percentage assessment is made against carriers." 2 A. Larson, *supra*, § 59.31(b) at 10-394.

The court below held the Special Fund assessment to be a regulatory fee and not a tax because it believed that the "primary purpose of the DCWCA was regulation, not the raising of revenue." It described the workers' compensation scheme, "of which the Special Fund is an integral part", as regulation of employers' liability. The Special Fund was indirectly part of this regulation, the court reasoned, because increased contributions were exacted to the Special Fund when an employer's "*proportion of direct compensation liabilities increases.*" *Brock v. WMATA*, 796 F.2d at 488 (emphasis added). This is simply incorrect. The proportion of the total cost of the Fund borne by each employer depends in large part on the number of employers in the fund. Assessments increase not because the employer's worker's compensation experience is getting worse, but because the pool of carriers and self-insurers is shrinking. The applicable DCWCA assessment formula set out at 33 U.S.C. § 944(c)(2) is based on the ratio of the *total* amount of compensation and medical expenses paid by each carrier and self-insured employer under DCWCA (a figure that has no relationship to Special Fund payments) to the total amount of compensation and medical expenses paid under DCWCA for that same year. Each carrier and self-insured employer is then assessed that same ratio of the estimated total liabilities of the Special Fund for the present year. The assessment bears no relationship to any benefit the employer may receive from the Special Fund, nor is it intended as a penalty for having to pay worker's compensation claims. Because there have been no new DCWCA basic compensation cases since 1982, when the New Act became effective, the rapidly increasing assessments into the Special Fund are due, in

large part, to the shrinking number of employers subject to the Fund.[4] The failure of the court below to recognize this important fact led it to mischaracterize the entire relationship between WMATA and the Special Fund.

Because the court below styled the Special Fund as a regulatory fee, it held that WMATA is not exempt under Section 78 of the Compact, which exempts WMATA from taxes and assessments. In so holding, the court ignored the meaning of Section 78 and its legislative history, which show plainly that it is intended to be an absolute barrier to the diversion of WMATA's resources from transit purposes. Since Congress expected that a significant portion of the cost of constructing the rail system would be financed by the sale of bonds serviced by "all the properties and revenues" of the Authority, it obviously did not intend WMATA's assets to be drained in this manner. H.R. Rep. No. 1914, 89th Cong., 2nd Sess. 7 (1966). Further, in consenting to the WMATA Compact, Congress expressly provided in Section 5 of the consent legislation that all

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[4] The 1984 amendments to LHWCA do not apply to DCWCA employers. *Keener v. WMATA*, 800 F.2d 1173 (D.C. Cir. 1986). However, the amendments are important because they reinforce the non-user fee nature of the Special Fund Assessment. The 1984 amendments to LHWCA adjusted the funding formula for the Special Fund. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub.L. No. 98-426, §§ 10, 27, 98 Stat. 1647, 1654. The adjustment to 10(h) payments merely changes the federal government's share of such funding. The new formula for Special Fund assessments for § 8(f) benefits develops two factors, one of which is new. The first factor is the ratio between total compensation paid and the compensation paid by any given employer—this is the same as the formula at issue here. To this factor the ratio of total 8(f) payments to 8(f) payments made on behalf of the single employer is added. The combined total of the two factors is then divided by two. The resulting percentage is then multiplied by the expected needs of the Special Fund for the coming year. The tax under the new formula would still be greatly in excess of benefits received by WMATA claimants since the pool of carriers and self-insurers is shrinking, while the number of Special Fund claimants remains constant.

federal laws except those pertaining to testing and inspection of equipment and malfunctions inconsistent with the Compact were amended to conform to the terms of the Compact. Pub. L. No. 89-774, *codified at* D.C. Code Ann. § 1-2440. Congress did not want any federal agency or law to interfere with the planning, development, financing, construction or operation of WMATA's public transportation system. Read together, Section 78 of the Compact and Section 5 of the Compact consent legislation preclude precisely the kind of exaction the Court of Appeals found the Special Fund to be.

Further, in interpreting the Special Fund as a regulatory fee and not a tax, the court below circumvented WMATA's tax exemption without even considering the relevance of another section of the Compact. Under Section 77 of the Compact, WMATA is generally exempt from regulation by the federal government and the signatories. This provision was included in the Compact to protect WMATA from the needless costs of competing or conflicting regulation by the federal government and the signatories. *Malone v. WMATA*, 622 F. Supp. 1422 (E.D. Va. 1985); *Gay Activists Alliance of Washington, D.C., Inc. v. WMATA*, No. 78-2217 (D.D.C. July 5, 1979); *C.T. Hellmuth & Associates, Inc. v. WMATA*, 414 F. Supp. 408 (D. Md. 1976). The court's decision threatens to nullify Section 77 by permitting the federal government and the signatories to engage in just such conflicting regulation merely by characterizing their actions as "fees" or "penalties".

The court below relied upon *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874 (4th Cir. 1983), to demonstrate that the Special Fund obligation is a fee attendant to regulation. The fee at issue there was a dairy price support fee established under the Omnibus Budget Reconciliation Act of 1982, 7 U.S.C. § 1446 (1982), and intended to regulate milk production by suppressing chronic overproduction. As such, it was tantamount to a penalty, imposed

for overproduction.[5] In contrast, DCWCA created the Special Fund as an *incentive* to employers to hire handicapped workers. Nothing in the Special Fund's legislative history suggests that it was designed, even in part, to penalize employers for personal injuries suffered by their employees. To the contrary, in 1972 Congress announced that the purpose of the Special Fund assessments was:

> to limit the burdens on employers in so-called second injury cases .... It is unfortunately a widespread belief that an employer is subject to burdensome compensation costs where a handicapped worker receives an injury at the new place of employment. The provision in the bill makes clear that the employer's responsibility ... is limited .... This method of *spreading the risk among all employers is intended by the committee to encourage the employment of handicapped workers.*

H.R. Rep. No. 1441, 92nd Cong., 2nd Sess. (1972) 8, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4705-4706 (emphasis added).

This Court has defined a tax as "an enforced contribution for the payment of public expenses. It is laid by some rule of apportionment according to which the persons or property taxed share the public burden." *Houck v. Little River Drainage District*, 239 U.S. 254, 266 (1915). The Court went on to define assessments as a variety of tax. "When local improvements may be deemed to result in special benefits, a further classification may be made, and special assessments imposed accordingly." *Id.* at 266. An assessment is therefore a tax laid on a more limited class of persons or property.

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[5] *Id.* at 882-83. *See Report to the Congress by the Comptroller General of the United States, Overview of the Dairy Surplus Issue—Policy Options for Congressional Consideration*, GAO-RCED-85-132, Sept. 18, 1985, B-22407 pp. 13, 18.

This Court has also distinguished between a tax and a penalty, which is "punishment for an unlawful act." In *United States v. LaFranca*, 282 U.S. 568, 572 (1931), it held that a penalty imposed on an illegal seller of liquor could not be turned into a tax simply by calling it so. In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), the Court re-emphasized that a tax is a nonconsensual exaction on any group of persons for public purposes, without regard to whether the taxpayer caused the condition being remedied or benefited by the exaction, or whether or not the benefit from the exaction was paid to individuals. *Id.* at 518, 521, 525.

Accordingly, well-settled principles of law make clear that the Special Fund assessment is not a regulatory fee that may lawfully be imposed on WMATA under Section 77 of the Compact.

III. WMATA Is Exempt From All Taxes As A Matter of Federal Law and Its Tax Exemption Must Be Read to Achieve WMATA's Public Purpose.

Nothing in the legislative history of Congress' approval of the WMATA Compact supports the conclusion reached below that WMATA's tax exemption does not exempt it from payment of Special Fund Assessments. The language of Section 78 was drawn broadly:

> It is hereby declared that . . . the carrying out of the corporate purposes of the Authority is in all respects for the benefit of the people of the signatory states and is for a public purpose and that the Authority and the Board will be performing an essential government function . . . in the exercise of the powers conferred by this Title. Accordingly, the Authority and the Board shall not be required to pay taxes or assessments upon any property . . . or upon its actions in the operation and maintenance of any transit facilities or upon any revenues therefrom and the property

> and income derived therefrom shall be exempt from all federal, State, District of Columbia, municipal and local taxation. This exemption shall include, without limitation, all motor vehicle license fees, sales taxes and motor fuel taxes.

The overall financial plan for constructing and operating the rapid rail system confirms that Congress intended to protect WMATA's assets for the repayment of bond holders and not to permit their use to defray costs of other government or public programs.[6] Congress expected that a significant portion of the construction costs would be financed by the sale of bonds serviced by "all the properties and revenues" of the Authority. H. R. Rep. No. 1914, 89th Cong., 2nd Sess. 7 (1966).

By 1979, under the authority granted by the National Capital Transportation Act of 1972, WMATA had issued $997 million in construction bonds with maturity dates in the years 2012, 2013 and 2014. All the bonds were and are federally guaranteed.[7] In 1979 Congress authorized an additional $1.7 billion for completion of WMATA's rapid rail system. Pub. L. No. 96-184. Before any of those funds could be appropriated, WMATA was required to establish a sinking fund to repay the interest and principal on the outstanding bonds. Further, the participating jurisdictions had to provide "stable and reliable" sources of funds to ensure that all operating costs will be met. These events, together with the unequivocal language of Section 78, clearly show that Congress intended WMATA's assets to be devoted exclusively to building and operating mass

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[6] *D.C. Area Transit Compact*, Hearing Before Subcomm. No. 3 of the Comm. on the Judiciary of the House of Representatives on H.J. Res. 1163, H.J. Res. 1164, H.R. 15588, H.R. 15599, H.R. 15600, H.R. 15603 and H.R. 15719, 89th Cong., 2nd Sess. 75(b) (1972) (Statement of President Lyndon B. Johnson).

[7] S. Rep. No. 475, 96th Cong., 1st Sess. at 4 (1979); H.R. Rep. No. 156, 96th Cong., 1st Sess. at 4 (1979).

transit. There is no basis for assuming that Congress, silently and inconsistently with Section 78, excluded burdensome regulatory fees and penalties from its broad prohibition against taxes and exactions.

Nonetheless, the court below did not even attempt to apply the tax exemption broadly created by Section 78. Instead, the court bypassed Section 78 by reasoning that "a levy is properly defined as a 'tax' within the meaning of the WMATA Compact provision when its principal purpose is to raise revenue, not to regulate activities." *Brock v. WMATA*, 796 F.2d at 488. Even under this interpretation, however, the Special Fund must be a tax because its purpose is clearly to raise funds to cover the extra costs of second injuries, insolvencies and other problem areas.

Further, if the Special Fund were a regulation it would still have to pass muster under Section 77 of the Compact. As the D.C. Corporation Counsel acknowledged in an opinion concerning the applicability of the District's No-Fault Law assessment to WMATA, which was included in the record below, "the District has no legal authority to enforce against WMATA ... the financial contribution requirements" of the No-Fault automobile insurance administration fund. Joint App. at 117. The opinion emphasized that "the District may not unilaterally amend the WMATA Compact". *Id.* The No-Fault assessment, like the Special Fund assessments at issue here, was intended to support an administrative fund to pay benefits to individuals.

If the Special Fund is not a tax it must be an assessment, and under the literal words of its tax exemption, WMATA is immune from assessments by the federal government and the signatories. *See, e.g., Kansas City v. Fairfax Drainage Dist.*, 34 F.2d 357 (10th Cir. 1929), *cert. denied*, 281 U.S. 722 (1930), where the court was asked

to determine whether certain waterworks located in both Kansas and Missouri were subject to assessments:

> attentive reading of the whole of the Compact and agreement, with a mind free from narrow technical objections, leaves no doubt that it was the intention of the two States to exempt from taxation and assessments of every kind and character whatsoever . . .

Id. at 361. Assessments are simply apportionments of taxes. *See Commissioner of Internal Revenue v. Patrick Cudahy & Co.*, 102 F.2d. 930 (7th Cir. 1939). The language of Section 78 exempts WMATA from "taxes *or* assessments" (emphasis added) and, as stated above, Congress has expressly defined the Special Fund payments as assessments. This Court has held that Acts of Congress are to be construed according to their plain language. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

IV. WMATA, As An Agency of the District of Columbia and Two States, Is Immune From Federal Taxation.

Even if the tax exemption provided by the Compact were thought unclear or inadequate, WMATA would still be exempt from assessments into the Special Fund because such assessments are federal taxes which may not be imposed on states and their instrumentalities. *Ohio v. Helvering*, 292 U.S. 360, 368 (1934); *New York v. United States*, 326 U.S. 572, 576 (1946).

Congress itself made WMATA a state agency and declared that WMATA is performing a governmental function. WMATA is by the terms of its congressionally sanctioned interstate compact "an agency and instrumentality of each of the signatory parties." Pub. L. No. 89-774, *codified at* D.C. Code Ann. § 1-2431(1)(d),(e) and (4). It is therefore a state instrumentality and agency. *See, e.g., Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986);

WMATA v. One Parcel of Land, 706 F.2d 1312 (4th Cir. 1983); *Strange v. Chumas*, 580 F. Supp. 160 (D.D.C. 1983); *Qasim v. WMATA*, 455 A.2d 904 (D.C. App. 1983), *cert. denied* 461 U.S. 929 (1983); *Potomac Electric Power Co. v. State Corp. Comm.*, 272 S.E.2d 214 (Va. 1980).

The holding of the court below that the Special Fund assessment did not violate state immunity from federal taxation because it was a user fee, and not an illegal tax, is contrary to the decisions of this Court. In *Massachusetts v. United States*, 435 U.S. 444 (1978), this Court drew two distinctions between improper taxes and user fees in the context of intergovernmental immunity. First, unlike prohibited taxes, user fees represent the approximate cost of a value conferred specifically on the payor by the exacting entity. Second, user fees collect only enough money to confer the specific benefits on the user class and do not confer benefits on the public at large. *See also United States v. Maine*, 524 F.Supp. 1056, 1059-60 (D. Me. 1981).

In contrast, prohibited taxes are levied without regard to the value received by the payor. Nor is there any limit on the purposes to which the money may be applied, as there is with a user fee. 435 U.S. at 460-61. The Special Fund plainly does not satisfy the first element of the *Massachusetts* test. Even given the Court of Appeals' reliance on the revised Department of Labor figures, an assessment of at least $1.2 million is not a fair approximation of any use by WMATA of the Special Fund—involving at most $490,000.00 in payments to former WMATA employees.

Further, the federal government, through the Special Fund assessment made on behalf of D.C., is taxing WMATA, a state agency engaged in an essential governmental function. The tax goes to the performance of that function and therefore is precluded by the Constitution. In dicta, the court below reasoned that the operation of WMATA's mass transit system is a proprietary function. In so doing, the court ignored Section 78 of the Compact,

which defines WMATA's activities as essential governmental functions, and Section 80, which draws a distinction between governmental and proprietary activities for purposes of tort liability but otherwise defines WMATA's activities as governmental functions. Finally, nothing in the plurality decision in *Massachusetts* limits application of the doctrine of state immunity from federal taxation to governmental functions, as the court below assumed.

Conclusion

The decision of the court below disregarded the clear language of a Congressionally approved interstate compact and ignored the precepts established by this Court for the interpretation of such compacts. Further, the decision burdens the taxpayers of Maryland and Virginia with costs which in no way benefit them or the region generally. WMATA's public purposes cannot be carried out if the terms of its charter are ignored. Sections 77 and 78 of the Compact, read together, exempt WMATA from the Special Fund whether it is a "tax or assessment" or whether it is unauthorized regulation. For the foregoing reasons, we urge the Court to grant the petition and reverse the judgment below.

Respectfully submitted,

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APPENDICES

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APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

WILLIAM E. BROCK, Secretary of Labor

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Appellant.

No. 85-5969.

Argued May 27, 1986.

Decided July 18, 1986.

The Secretary of Labor sought payment from tax exempt transit authority for special fund created by Longshore and Harbor Workers' Compensation Act to discourage discrimination against disabled by providing supplemental compensation to claimants injured during course of employment. The United States District Court for the District of Columbia, Parker, J., 614 F.Supp. 1419, granted the Secretary's motion for summary judgment. The transit authority appealed. The Court of Appeals, Ginsburg, Circuit Judge, held that: (1) transit authority did not enjoy intergovernmental tax immunity from obligation to make payments to special fund, and (2) authority was not shielded by its compact from making payments.

Affirmed.

Appeal from the United States District Court for the District of Columbia.

Carol A. Sigmond, with whom Sara E. Lister and Mark R. Pohl, Washington, D.C., were on brief, for appellant.

Joshua T. Gillelan, II, with whom Donald S. Shire, Associate Solicitor, Dept. of Labor, Washington, D.C., was on brief, for appellee.

Before ROBINSON, Chief Judge, GINSBURG, Circuit Judge, and EDWARD D. RE,* Chief Judge, United States Court of International Trade.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

Under the District of Columbia's workers' compensation regime, all employers (or their compensation carriers) contribute to a Special Fund from which the Secretary of Labor (Secretary) makes a variety of payments to injured workers. *See* 33 U.S.C. § 944. The Washington Metropolitan Area Transit Authority (WMATA), in 1983, stopped contributing to the Fund. WMATA asserted that its tax exempt status immunized it from the obligation to make Fund payments. The Secretary sued WMATA to collect arrearages; on crossmotions for summary judgment, the district court held for the Secretary. We affirm.

WMATA initially resisted the Secretary's suit on the ground that the Special Fund obligation is a tax against which WMATA is insulated by the compact that created it. *See* WMATA Compact § 78, Pub.L. No. 89-774, 80 Stat. 1324, 1350 (1966), codified at D.C. Code § 1-2431(78). Before this court, WMATA adds the argument that the constitutional doctrine of intergovernmental tax immunity (here, state immunity from federal taxation) shelters it from liability for Special Fund contributions.

We hold that WMATA enjoys neither constitutional nor compact immunity from the obligation to make payments to the Fund. As to the intergovernmental tax immunity doctrine, under *Massachusetts v. United States,* 435 U.S.

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978), the obligation is properly characterized as a user fee, not a proscribed tax. Under the WMATA Compact as well, the Fund contribution obligation does not qualify as a tax from which WMATA is spared; instead, the obligation is most appropriately regarded as a fee attendant to regulation. *Cf. South Carolina v. Block,* 717 F.2d 874 (4th cir. 1983).

I. BACKGROUND

The District of Columbia Workmen's Compensation Act of 1928 (DCWCA or the Act), Pub.L. No. 70-419, 45 Stat. 600, formerly codified at D.C. code §§ 36-501-502 (1973), extended the workers' compensation protection of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, to employees in the District of columbia until 1982, when the DCWCA was superseded by new legislation, D.C.Code § 36-301 *et seq.* (1979 & Supp.1984).[1] WMATA acknowledges its direct liability to employees for work-related injuries under the DCWCA, *see* Brief for Appellant at 7, and we have found WMATA liable for such injuries in the past. *See, e.g., Durrah v. WMATA,* 760 F.2d 322 (D.C.Cir.1985).

While WMATA recognizes the DCWCA's governance of compensation claims filed by its employees, WMATA disclaims liability for contributions to the DCWCA Special Fund, a resource created in its present form in 1972, *see* Pub.L. No. 92-576, 86 Stat, 1251, codified at 33 U.S.C. § 944. Administered by the Department of Labor, the Fund is kept separate from all other government funds. It is drawn upon for several kinds of workers' compensation payments. Currently, about ninety percent of the Fund's expenditures are "second injury" payments under Section 8(f) of the LHWCA, 33 U.S.C. § 908(f). That section pro-

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[1] The new legislation governs liability for employment-related injuries suffered after July 26, 1982, but employers continue to be liable under the DCWCA for injuries suffered before that date.

vides that when a worker who is already partially disabled suffers a second injury that permanently disables him, and the extent of that permanent disability is greater than it would have been but for the preexisting disability, the Special Fund, in lieu of the employer (or its compensation carrier), will pay a portion of the disability compensation.[2] The arrangement is intended to enhance employment prospects for the handicapped by alleviating employer fears that workers' existing disabilities will lead to inordinate compensation liabilities in the event of a later accident.

The amount each employer must contribute to the Fund is determined by a formula set out in 20 C.F.R. § 702.146. The formula first calculates the ratio of two amounts: 1) the direct DCWCA payments made during the previous year by *each* self-insured employer or insurer for an employer subject to DCWCA; and 2) the total direct DCWCA payments made by *all* employers and insurers during the same period. The contribution of each self-insured employer or insurer to the special Fund is then set as the same fraction of the total estimated Fund liabilities for the upcoming year. Each employer thus bears the same share of the Special Fund liabilities as that employer's share of the total direct compensation liabilities.

From 1974 until 1982, WMATA was a self-insured employer and made its contributions to the Special Fund without protest.[3] Throughout that same period, WMATA now

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[2] As for payments in other categories, about 8% of the Fund's expenditures are "adjustments" under LHWCA § 10(h), 33 U.S.C. § 910(h). That section provides for the upward adjustment of compensation rates for employees injured before 1972, because prior to that date the law set a low ceiling on compensation payments and provided for no cost of living increases. The remaining 2% of the Fund's expenditures are made under a variety of provisions of the LHWCA, §§ 7(e), 8(g) & 18(b), 33 U.S.C. §§ 907(e), 908(g) & 918(b).

[3] The Secretary observes that WMATA's current protest coincides with the termination of the statutory requirement that it obtain au-

claims, its contributions to the Fund were considerably greater than the benefit it received from the Fund, *i.e.*, the Fund's payouts to WMATA employees. WMATA refused to pay the second half of its 1983 contribution and all of its 1984 contribution. The Secretary of Labor therefore commenced this action to collect the unpaid assessments. WMATA counterclaimed for a refund of all its past Special Fund contributions, urging that the payments it once made without protest were taxes from which WMATA is totally exempt under its Compact.

The district court ruled that WMATA is not exempt from the Special Fund assessments. First, the court held that the assessments fall outside the compact's exemption because they are "used to supply a specific fund with a specific purpose—in this case providing supplemental benefits in second injury cases," and "do not in a general sense finance the public expense." *Donovan v. WMATA*, 614 F.Supp. 1419, 1421 (D.D.C.1985) (WMATA). The court also observed that WMATA's tax exemption is limited to taxes on property, activities, and revenue, and held that the Special Fund assessments, even if they could be typed "taxation," would not qualify as taxes on property activities, or revenue. *See id.* at 1421-23.[4] WMATA now appeals this determination.

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thorization to act as a self-insurer. *See* Brief for Plaintiff-Appellee at 8-9. The district court, although acknowledging WMATA's position that "its refusal to pay the assessment is based upon reevaluation of the propriety of compliance," found "striking the coincidence in time between WMATA's refusal to pay and the termination of its obligation to pay as [a condition of remaining] a self insurer." *Donovan v. WMATA*, 614 F.Supp. 1419, 1420-21 n. 3 (D.D.C.1985) *(WMATA)*.

[4] The district court correctly observed that, while the Compact exemption refers to "taxes or assessments," the latter word "signif[ies] only a localized liability," and does not expand the scope of the exemption. *See WMATA*, 614 F.Supp. at 1422 n. 7.

II. DISCUSSION

WMATA advances two related contentions. First, it offers an argument that it did not present to the district court: WMATA is spared from the obligation to contribute to the Special Fund by the constitutional doctrine of intergovernmental tax immunity. In support of this contention, WMATA cites *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978), which assumes, without deciding the point, that the state-federal tax immunity doctrine retains "present vitality," *id.* at 454, 98 S.Ct. at 1160, and then holds that "taxes that operate as user fees," *id.* at 463, 98 S.Ct. at 1165, are not proscribed by the doctrine. Second, WMATA maintains that it is immune from the Special Fund obligation under Section 78 of the WMATA Compact. Here again, WMATA cites the *Massachusetts* precedent, which it reads as defining a proscribed tax in the manner intended by the Compact provision.[5]

We hold that the Special Fund obligation qualifies as a user fee, not a proscribed tax, under the *Massachusetts* definition; therefore, both of WMATA's arguments fail. We further hold, however, that the analysis most appropriate for determining whether the Fund payment obligation constitutes a tax exempt under WMATA Compact § 78 is the one employed in *South Carolina v. Block*, 717 F.2d 874 (4th Cir. 1983). Under that delineation, the Special Fund obligation is properly regarded not as a tax from

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[5] The parties also repeat arguments of a rather abstract quality, earlier aired in the district court, about whether the Special Fund obligation, if a tax, is a tax "on" property, operations, or revenue. *See* Brief for Appellant at 28-43; Brief for Plaintiff-Appellee at 30-46. Because we hold that the obligation qualifies as a user fee, and therefore may be imposed on WMATA without affront to the constitution or the Compact, we need not and do not pursue metaphysical inquiries on what is a tax, and when is a tax "on" something. *See infra* at 8-13, 17-18.

which the Compact exempts WMATA, but as a fee attendant to regulation.

A. Constitutional Immunity

In the hoary case of *Collector v. Day*, 78 U.S. (11 Wall.) 113, 20 L.Ed. 122 (1871), the Supreme Court declared that states and state instrumentalities are constitutionally immune from federal taxes on certain state functions because otherwise, by invoking its awesome taxing power, the federal government would be positioned to destroy state sovereignty. *Collector v. Day* held salaries paid to state judges immune from federal tax and that holding itself has been overruled. *See Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1939). Moreover, the reach of the constitutional immunity doctrine has been so restricted that its "present vitality" is open to question. *See Massachusetts*, 435 U.S. at 454, 98 S.Ct. at 1160.[6]

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[6] Before *New York v. United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946), the Court held that the federal government may tax "proprietary" state functions but not "essential governmental" functions. Although this distinction proved difficult to apply, the Court did hold that the operation of a street railway was a proprietary function, *see Helvering v. Powers*, 293 U.S. 214, 227, 55 S.Ct. 171, 174, 79 L.Ed. 291 (1934), and this holding has never been overruled. By simple application of precedent, then, we conclude that WMATA's operation of a public transit system is a proprietary function, and so even if a tax, the Special Fund obligation as applied to WMATA does not violate the doctrine of intergovernmental tax immunity.

As our text statement indicates, we are uncertain whether the doctrine of state immunity from federal taxation retains any substantive content at all. In *New York v. United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946), Justice Frankfurter delivered the judgment for the court in an opinion in which Justice Rutledge joined; surveying the confusion wrought by attempts to create a substantive standard, he concluded that the states' only constitutional protection against nondiscriminatory taxes was structural: their representation in Congress. *See id.* at 580–84, 66 S.Ct. at 313–15 (Four other justices agreed that the "governmental/proprietary" distinction was unworkable but preferred to retain a "practical construction" of the doctrine of intergov-

Assuming arguendo that the doctrine survives, albeit shrunken in size, the scope of the immunity plainly has been restricted both with respect to the activities sheltered and the kinds of financial obligations covered. The Supreme Court has instructed, most recently, that no immunity attaches to an obligation properly typed as a user fee. *See Massachusetts, supra.* Such obligations, the Court has indicated, do not threaten state sovereignty, regardless of the nature of the state activities on which they are laid.

We turn now to an explanation of our holding that the Special Fund assessment is not a tax of the kind that a still vital intergovernmental tax immunity doctrine would encompass. In that frame of reference, the assessment qualifies as a user fee. In *Massachusetts,* the Supreme Court set out three features which, for tax immunity purposes, distinguish permissible user fees from proscribed taxes. The parties apparently agree that the Special Fund bears the first two features of a user fee. First, user fees do not discriminate against state functions. *See* 435 U.S. at 466, 98 S.Ct. at 1166. The Fund obligation does not so discriminate, for it is applicable to private and public employers alike. Second, user fees "are structured to produce

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ernmental tax immunity, developed on a case-by-case basis. *Id.* at 586-89, 66 S.Ct. at 316-18.)

More recently, in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), the Court held that the closely analogous doctrine of state immunity to federal regulation has no substantive content. Citing and following the structure of Justice Frankfurter's opinion in *New York,* the court surveyed the confusion wrought by its attempt to create a substantive standard and concluded that the states' constitutional protection against federal regulation is not substantive but structural through their representation in Congress. *See id.* at 1012-14.

Given the state of High Court precedent, we think if fair to say, as the plurality did in *Massachusetts v. United States,* 435 U.S. 444, 454, 98 S.Ct. 1153, 1160, 55 L.Ed.2d 403 (1978), that the "present vitality of the doctrine of state tax immunity" is unsettled.

revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied." *Id.* at 466-67, 98 S.Ct. at 1167. The Special Fund is so structured; it is a separate fund within the United States Treasury and statutorily not "the money or property of the United States." LHWCA § 44(a), 33 U.S.C. § 944(a).

The parties centrally disagree on whether the Special Fund obligation bears the third characteristic of user fees: such fees recover only a "fair approximation of each beneficiary's share of the cost." 435 U.S. at 460, 98 S.Ct. at 1164; *see id.* at 465-66, 98 S.Ct. at 1166. WMATA, now seeking to avoid contributions entirely, argues that it has historically paid into the Fund more than its fair share of the Fund's costs; its assessments, WMATA contends, have been significantly higher than the Fund's payouts to WMATA employees. *See* Brief for Appellant at 22-23. We have some doubt about the accuracy of this proposition as a factual matter.[7] Even if correct, however, the allegation

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[7] WMATA bases its claim on an affidavit prepared by the Special Assistant to WMATA's Risk Manager. *See* Affidavit of Richard A. Barnes (Nov. 16, 1984), Joint Appendix (J.A.) at 119-31. That affidavit states that WMATA calculated the Fund payout to WMATA employees in the following manner: WMATA learned from the Department of Labor how much money the Special Fund had paid to WMATA employees during the period January-May 1984 ($79,410.74); WMATA then annualized that amount to estimate the total payout for 1984 (about $190,000); WMATA next subtracted 4.5% from that amount as an allowance for inflation for each preceding year to calculate the payout to WMATA employees in those earlier years. WMATA then graphed these payout figures against the WMATA assessments, which were obtained from historical records. *See* J.A. at 124.

Two features of this graph undercut WMATA's claim that its burdens have consistently exceeded its benefits. First, although after 1979 the assessment line is higher than the payout line, in 1978 the two lines intersect, showing that WMATA's assessment equalled its employee payout benefits from the Fund. Second, except for the period January-May 1984, all of the payout figures are estimated on the assumption that the payout level remained constant except for inflation.

of *historical* disproportionality of costs and benefits is hardly dispositive of the question at issue. *Massachusetts* did not hold that a user fee must represent retrospectively a close approximation of the actual, historical benefit to the user. Rather, *Massachusetts* held only that the method used to calculate the fee must rationally be designed to approximate prospectively the benefit to the user.

The levy held constitutional in *Massachusetts* illustrates this meaning of "fair approximation." The fee was a flat registration tax for all civil aircraft, introduced to help finance federal aviation programs; the amount of the fee was based on the size and type of aircraft, but not the aircraft's actual use of the airways or the facilities and services supplied by the United States. Massachusetts sought exemption for aircraft it owned and used exclusively for police functions. The Court rejected the state's plea.

The *Massachusetts* opinion acknowledged that a fee based on actual use would measure the benefit to the user more accurately. The Court emphasized, however, that an actual use measurement method would be more costly to administer. Furthermore, the Court observed, the measurement method employed does bear a fair relationship to the ben-

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This assumption, implausible on its face, has now been shown to be unwarranted. Based on the data for January-May 1984, WMATA calculated a payout of about $190,000 for 1984; the Secretary now informs us that the Special Fund actually paid out about $446,000 to WMATA employees during 1984. *See* Brief for Plaintiff-Appellee at 10. This amount is still less than WMATA's $1.1 million assessment for the same period, but even by WMATA's calculation method, if WMATA had based its computations on a figure of $446,000 in 1984, the payout line would have intersected the assessment line closer to 1980 than 1978 and would have been higher than the assessment line before that. More basically still, we simply have no way of knowing with any certainty the actual payout figures for the years before 1984. While it is true that assessment exceeded payout in 1984, payout may have exceeded assessment in the earlier years, and on average over the whole period the payout may have equalled or exceeded the assessment.

efit: bigger planes are more expensive for the federal safety system to accommodate. Finally, the Court noted that all users receive certain ambient or indirect benefits from the federal aviation system: the federal services are available to, and make the airspace safer for, all users. *See* 435 U.S. at 468–69, 451 n. 9, 98 S.Ct. at 1167–68, 1159 n. 9.

Judged by the *Massachusetts* example, the Special Fund assessment fairly approximates the Fund's benefit to WMATA. An assessment based on the amount of the Fund's past payout to WMATA employees, rather than on WMATA's direct DCWCA liabilities, might be a more accurate measure of the benefit WMATA enjoys from the Fund.[8] Such a method of assessment, however, would also be more burdensome to administer because it would require the Secretary to calculate and record separately total Fund payouts to the employees of each employer.[9] The present method of calculation, moreover, does bear a fair relation to the benefit. The assessment is based on the employers' direct workers' compensation liabilities; employers who make more direct payments most probably have more employees who make "second injury" claims on the Special Fund, for such employers are likely to have

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[8] WMATA correctly observes that it can never benefit from two components of the Fund's expenditure. First, 8% of the Fund's payouts are adjustment payments for workers disabled before 1972, *see supra* note 2, but WMATA did not become subject to the DCWCA until 1973. Second, under LHWCA § 18(b), 33 U.S.C. § 918(b), somewhat less than 2% of the Fund's payments are made to workers who are owed compensation by insolvent employers or insurers, but WMATA, by the terms of its charter, will never become insolvent. *See Morris v. WMATA*, 781 F.2d 218 (D.C.Cir.1986).

[9] At present, the Secretary does apparently record the raw data necessary to make these calculations; indeed, it is from these data that he calculated the payout to WMATA employees for this case. However, the Secretary apparently does not perform such calculations as part of his normal recordkeeping; the calculations in this case were made in response to an interrogatory by WMATA. *See* Affidavit of Richard A. Barnes at ¶ 3, J.A. at 120.

more employees, more handicapped employees, less safe working conditions, or some combination of these three characteristics.

Finally, like the *Massachusetts* registration tax, the Fund provides certain ambient or indirect benefits to each employer over and above actual payouts to the employer's workers. First, the workers' compensation liability system in general, and the Special Fund in particular, furnish all District of Columbia employers with a substitute for the tort system of employer liability, *see* LHWCA § 5(a), 33 U.S.C. § 905(a); WMATA may take advantage of the "second injury" fund whenever one of its employees with a pre-existing disability becomes permanently disabled. In addition, the existence of the Special Fund, as one component of complete workers' compensation protection, arguably benefits employers by making employees more secure and therefore more productive. Furthermore, the Fund may reduce WMATA's direct compensation liability: because of the availability of the "second injury" payments, other employers may be induced to hire partially disabled workers to whom WMATA has been paying compensation. To the extent that these workers will thus have enhanced employment opportunities, WMATA's compensation payments will be reduced.

WMATA insists that even allowing for these ambient benefits, its contributions to the Fund historically have exceeded the benefits WMATA and its employees have received from the Fund. *But cf. supra* note 7. The argument does not carry the weight WMATA ascribes to it. The possibility that a state instrumentality may be somewhat overcharged for the benefits it receives from a federal program poses no threat of undue federal encroachment upon a state's domain as long as the charge imposed is nondiscriminatory and represents a "fair approximation" of the benefits received. *See Massachusetts,* 435 U.S. at 466, 98 S.Ct. at 1167. Because we find that the payments in question entail a fair approximation of

projected benefits, and, moreover, relate to a "proprietary" function, *see supra* note 6, we conclude that WMATA cannot tenably claim constitutional immunity from the Special Fund assessment.

B. Compact Immunity

WMATA was created in 1966 by a compact between the District of Columbia, Virginia, and Maryland, with the consent of Congress. *See* Pub.L. 89-774, 89th Cong., 2d Sess., 80 Stat. 1324 (1966), codified at D.C. Code § 1-2431. Section 78 of the Compact provides for WMATA's tax immunity:

> [The] carrying out of the corporate purposes of the Authority is in all respects for the benefit of the people of the signatory states and is for a public purpose. . . . Accordingly, the Authority and the Board shall not be required to pay taxes or assessments upon any of the property acquired by it . . . or upon its activities in the operation and maintenance of any transit facilities, or upon any revenue therefrom.

D.C. Code § 1-2431(78).

WMATA maintains that the "taxes or assessments" from which WMATA is exempt under Section 78 are those that constitute "taxes," not "user fees," under the analysis in the *Massachusetts* case. *See* Brief for Appellant at 22. As we have just explained, however, *see supra* at 8-13, under the *Massachusetts* analysis, the obligation to contribute to the Special Fund qualifies as a permissible user fee, not a proscribed tax.[10]

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[10] WMATA also cites In re Pan American Paper Mills, 618 F.2d 159 (1st Cir. 1980) (*Pan Am*), as a case closely in point which defines as a "tax" a nonconsensual exaction for a public purpose. *Id.* at 162. *Pan Am* concerned a statute which required employers to pay premiums to a workers' compensation insurance fund; Pan Am, an employer, filed for bankruptcy, and the government sought to have the premium arrearages accorded priority under § 64(a)(4) of the Bankruptcy Act, then

More fundamentally, we question whether the *Massachusetts* case offers the best frame of reference for the issue at hand, *i.e.*, is the obligation to contribute to the Special Fund a "tax" for purposes of the exemption stated in Section 78. Indeed, the *Massachusetts* opinion essays no definition of the term "tax." Rather, it defines "user fee" and states why such a fee is not a tax within the compass of the state immunity from federal taxation doctrine. *Massachusetts* surely does not say that federal financial exactions other than user fees are correctly typed "taxes" for all or any purposes. Rather, the Court's decision simply explains why states cannot claim tax immunity for a levy with the three characteristics set out in the *Massachusetts* opinion: a levy of the user fee kind "could never seriously threaten" state sovereignty. *See* 435 U.S. at 460, 98 S.Ct. at 1163. The preservation of essential state operations, however, was not the concern that motivated the tax exoneration provision in the WMATA Compact.

The language of Section 78 itself plainly indicates that provision's rationale. The section states:

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codified at 11 U.S.C. § 104(a)(4) (1976), which accorded priority to taxes. The *Pan Am* court's encompassing statement was framed to fit bankruptcy policies and the Supreme Court's "broad view of what constitutes 'taxes' within the meaning of § *64(a)(4)*." 618 F.2d at 162 (emphasis added).

As we explain in text, the tax exemption contained in § 78 of the Compact indicates concerns different from those reflected in § 64(a)(4) of the Bankruptcy Act. Here, and throughout its presentation, WMATA misses the point that the characterization of a payment as a "tax" in certain contexts has no "talismanic significance." *Massachusetts*, 435 U.S. at 460 n. 18, 98 S.Ct. at 1164 n. 18. As stated by a redoubtable legal scholar: "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933).

> It is hereby declared that the creation of the Authority is in all respects for the benefit of the people of the signatory states and is for a public purpose. . . . Accordingly, the Authority and the Board shall not be required to pay taxes or assessments. . . .

Since WMATA, in other words, serves an exclusively public purpose, no end would be achieved by making WMATA contribute to the public fisc money that will then be diverted to some other public good, like the police or fire departments. Rather, the path of efficiency is to allow WMATA to keep its money and pay for other public goods out of other revenues. A public good like WMATA cannot contribute to the commonweal out of private monies because it has none; its activity as a transit service is its contribution.

This rationale suggests that a levy is properly defined as a "tax" within the meaning of the WMATA Compact provision when its principal purpose is to raise revenue, not to regulate activities. The construction we thus pose is the familiar one used by courts in determining when Congress has exercised its taxing power, so that the challenged legislative action must satisfy the requirements of Article I, Sections 7 and 8 of the Constitution. The Supreme Court, over a century ago, explained the demarcation in *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884). That controversy concerned a fifty-cent head duty imposed on ship owners for each immigrant passenger carried to United States ports; the levy was paid into a separate fund used to finance the administration of the federal immigration statutes. The Court held that the head money charge involved an exercise of Congress' commerce power, not its taxing power, because "[t]he burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration. The title of the act, 'An Act to regulate im-

migration[ ]' [describes] the real purpose and effect of the statute. . . . The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government." *Id.* at 595–96.

Lower courts have employed similar reasoning in cases involving financial exactions from farmers under farm produce price support statutes. *See South Carolina v. Block,* 717 F.2d 874 (4th Cir. 1983) (deduction from sale of all commercially marketed milk, used to offset cost of milk support price program, is not exercise of taxing power); *United States v. Stangland,* 242 F.2d 843 (7th Cir. 1957) (financial penalty for growing crops in excess of statutory quotas is not an exercise of taxing power); *Rogers v. United States,* 138 F.2d 992 (6th Cir. 1943) (same); *Mandel v. Block,* 573 F.Supp. 1522 (S.D.N.Y.1983) (same holding as *South Carolina v. Block*); *Mulroy v. Block,* 569 F.Supp. 256 (N.D.N.Y.1983) (same), *aff'd,* 736 F.2d 56 (2d Cir. 1984) (per curiam). As the Fourth Circuit recently and succinctly expressed the distinction: "The mere fact a statute raises revenues does not imprint upon it the characteristics of a law by which the taxing power is exercised. . . . The imposition of assessments have [sic] long been held to be a legitimate means of regulating commerce. . . . If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax." *South Carolina v. Block,* 717 F.2d at 887 (citations omitted).

Under this construction, the Special Fund assessment is a fee rather than a tax because the "primary purpose" of the DCWCA is regulation, not the raising of revenue. The entire workers' compensation scheme, of which the Special Fund is an integral part, regulates employers' liabilities for industrial accidents. The scheme also indirectly regulates employers' conduct by holding them accountable for accidents and exacting increased contributions to the Special Fund when their proportion of direct compensation

liabilities increases. Thus, the DCWCA replaces tort law as the body of regulative law for this field, and fees associated with the statute are better compared with tort awards than with revenue-raising taxes.[11] Finally, like the levies at issue in the *Head Money Cases* and *South Carolina v. Block, supra,* the Special Fund assessments are "appropriated in advance to the uses of the statute, and do [ ] not go to the general support of the government." 112 U.S. at 596, 5 S.Ct. at 252.

In sum, the "primary purpose" of the DCWCA is to regulate liability for industrial accidents. This regulation may include the assessment of fees; but such fees are inextricably bound up with the regulatory scheme, they are not designed to raise revenue for public goods. We therefore conclude that the Special Fund assessment is not a tax as that term is employed in Section 78 of WMATA's Compact, but a fee attendant to regulation. Accordingly, we hold that WMATA is liable for the amount claimed.[12]

Conclusion

The definition of "tax" in the abstract is a metaphysical exercise in which courts do not have occasion to engage. The term comes before judges embedded in legal contexts from which the word gains concrete and specific meaning. In neither of the contexts here relevant—the doctrine of intergovernmental tax immunity and Section 78 of WMATA's Compact—is the Special Fund a tax from which WMATA is immune.

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[11] The district court suggested this point when it noted that the assessments are "less a legislative exactment than a part of the statutory dynamic between tort immunity for employers' [sic] and workmen's compensation." *WMATA,* 614 F.Supp. at 1421 n. 6.

[12] Because we uphold the district court's judgment that WMATA is not immune from the Special Fund assessment, we also uphold that court's rejection of WMATA's counterclaim for a refund of past contributions to the Special Fund.

Under the constitutional doctrine of state immunity from federal taxation, the Special Fund obligation qualifies as a permissible user fee, not a proscribed tax, because it does not discriminate against state functions, is structured to produce revenues that will not exceed costs, and is assessed according to a formula by which the Secretary will collect from each employer a "fair approximation" of the employer's share of the cost. *See Massachusetts*, 435 U.S. at 465-66, 98 S.Ct. at 1166-67. Under Section 78 of WMATA's Compact, the special Fund obligation is not a tax from which WMATA is shielded, because the primary purpose of the general statute that created the Fund—the DCWCA—is the regulation of liability for industrial accidents, not the raising of revenue. We therefore hold that WMATA is liable for the assessments the Secretary seeks to collect, and that WMATA is not entitled to refund of past Special Fund assessments. The judgment of the district court is

Affirmed.

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5969

September Term, 1986
CA No. 84-02161
RAYMOND J. DONOVAN, Secretary of Labor
v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
FILED OCT 2 1986
BEFORE: ROBINSON and GINSBURG, Circuit Judges;
and
RE*, Chief Judge, U.S. Court of
International Trade

ORDER

Upon consideration of appellant's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

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* Sitting pursuant to 28 U.S.C. § 293(a).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5969

September Term, 1986
CA No. 84-02161
RAYMOND J. DONOVAN, Secretary of Labor
v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
FILED OCT 2 1986
BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ginsburg, Bork, Starr, Silberman, Buckley and Williams, Circuit Judges; and RE*, Chief of Judge, U.S. Court of International Trade

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellant's suggestion for rehearing *en banc* is denied.

Per Curian

BY THE COURT:
GEORGE A. FISHER, CLERK

BY: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

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* Sitting by designation pursuant to § 293(a).

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-2161

RAYMOND J. DONOVAN, Secretary of Labor,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

FILED
JUL 19 1985

ORDER

The Court has considered in a Memorandum Opinion of this date, the plaintiff's motion for summary judgment and the defendant's motion for summary judgment. On basis of that Memorandum Opinion, it is this 19th day of July, 1985,

ORDERED

that plaintiff's motion for summary judgment is granted and judgment is entered for the plaintiff; and

That defendant's motion for summary judgment is denied.

/s/ BARRINGTON D. PARKER
BARRINGTON D. PARKER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-2161

RAYMOND J. DONOVAN, Secretary of Labor,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

FILED
JUL 19 1985

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

Before the Court are cross-motions for summary judgment filed by the parties in the above-captioned matter. The resolution of this case turns upon whether the Washington Metropolitan Area Transit Authority (WMATA), which is tax-exempt, is required to contribute to a special fund under section 44(c)(2) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 944(c)(2) (Supp. 1985). Because the Court is convinced that the required contribution does not constitute taxation and that, in any event, WMATA's exemption would not be applicable to workmen's compensation contributions, the Court grants summary judgment for plaintiff.

I.

BACKGROUND

WMATA operates public transit facilities and services in the Metropolitan Washington, D.C. area. It is a creature of an interstate compact ratified by the Congress. *See* D.C.

Code 1-2431 (Supp. 1984). In addition to declaring the purposes, functions, organization and operation of WMATA, the Compact also provides that WMATA "shall not be required to pay taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision or upon its activities in the operation and maintenance of any transit facilities or upon any revenues therefrom and the property and income derived therefrom shall be exempt from all federal, State, District of Columbia, municipal and local taxation. . . ."

WMATA, as an employer in the District of Columbia, is subject to the LHWCA, as extended by the District of Columbia Workmen's Compensation Act, 45 Stat. 600, formerly codified at 36 D.C. Code §§ 501-502 (1973) ("DCWCA").[1] The LHWCA is designed to insure that eligible employees are compensated fairly for claims arising out of their employment and is to be liberally construed. *Director, Office of Workers' Compensation Programs, United States Department of Labor* v. *Perini North River Associates*, 459 U.S. 297 (1983). As part of the scheme for funding of claims, section 44(c)(2) of the LHWCA requires that every insurer of an employer under the Act contribute to a "special fund," the purpose of which is to provide supplemental compensation to claimants in specific instances.[2]

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[1] Liability for injuries arising out of employment after July 26, 1982 is determined by successor legislation to the DCWCA. *See* D.C. Code §§ 36-301 (Supp. 1984).

[2] A primary purpose of § 44(c)(2) is to discourage discrimination against the disabled. Section 8(f) of the LHWCA protects employers of a disabled employee who suffers a second injury in the course of his employment from paying more than such an employer would pay had he hired a nondisabled worker. The employer is directly responsible only for the harm caused by the second injury. Any additional compensation is covered by the special fund, to which all employers' insurers contribute. Thus, no employer is discouraged from hiring a disabled worker for fear of aggravated exposure in the event of a second injury.

From 1973 until the time this action was commenced, WMATA operated as a self-insurer under the LHWCA. *See* 33 U.S.C. § 932(a)(1) and (2). As required of all self-insurers, WMATA contributed to the special fund without protest from 1973 until the middle of 1983, when it refused to make any further payments.[3] WMATA asserted in the middle of 1983 that its tax exemption under § 78 of the Compact excused it from liability under § 44(c)(2) of the LHWCA. The Court is called upon to determine whether this assertion is accurate and tenable.

II.

ANALYSIS

A. Contributions Under Section 44(c)(2) Do Not Constitute Taxation

WMATA argues in support of its contention that it has a tax-exempt status, that the contributions required by the LHWCA constitute a tax and not some other form of payment from which it would not be exempt. In support of this argument, it relies upon Massachusetts v. *United States*, 435 U.S. 444 (1978).[4] However, the Court concludes that defendant's reliance on this case is misplaced. *Mas-*

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[3] Plaintiff notes that WMATA's refusal to contribute to the fund prior to 1982 would have been a basis upon which WMATA's status as a self-insurer could have been denied or revoked. Since 1982, no insurance requirement has been in effect with respect to employers. Therefore, WMATA's status as a self-insurer no longer was in jeopardy, even upon refusal to comply with § 44(c)(2). Although WMATA asserts that its refusal to pay the assessment is based upon reevaluation of the propriety of compliance, the Court finds striking the coincidence in time between WMATA's refusal to pay and the termination of its obligation to pay as a self-insurer.

[4] Defendant also urges that In re Pan American paper Mills, Inc., 618 F.2d 159 (1st Cir. 1980), illustrates that contributions into a workmen's compensation fund constitute taxation. The Court rejects this argument based on its view that the Pan American case is unpersuasive in a nonbankruptcy context. *See infra*, p. 8, n.8.

sachusetts v. *United States* involved a determination whether a charge was a tax or a user fee under the Airport and Airway Revenue Act of 1970. The test enunciated[5] in that case was specifically tailored to address the question of whether a "registration tax" imposed by the federal government constituted an abuse of the federal taxing powers so as to interfere with a state's ability to perform essential services. The Court did not undertake to define a tax for general purposes and the specific factual and legal context in which that case arose makes it an undesirable precedent to govern the instant litigation. By contrast, several other cases indicate that an involuntary payment is a tax when it is assessed upon persons or property in order to raise general revenue to defray the public expense. *Pace* v. *Hannibal*, 680 S.W. 2d 944 (Mo. 1984); *Nebraska Public Power District* v. *Hershey School District*, 207 Neb. 412, 299 N.W. 2d 514 (1980); *Bob Pearsall Motors, Inc.* v. *Regal Chrysler-Plymouth, Inc.*, 521 S.W. 2d 578 (Tenn. 1975). This general rule suggests that contributions used to supply a specific fund with a specific purpose—in this case providing supplemental benefits in second injury cases—are not "taxes" within the meaning of the WMATA Compact.[6] The funds contributed under § 44(c)(2) of the LHWCA do not in a general sense finance the public expense. To the contrary, these funds are utilized only to provide supplemental benefits in second injury

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[5] The Supreme Court held in Massachusetts v. United States, that a charge would be considered a user fee and not a tax if the charge (1) was imposed in a nondiscriminatory manner; (2) was based on a fair approximation of each payor's share of the cost of the benefit received; and (3) was not excessive in relation to the cost to the government of the benefits received by the payor.

[6] Defendant notes correctly that taxes ordinarily are exacted for a public purpose. While compensation of injured workers is without question within the public interest, the Court views such contributions as less a legislative exactment than a part of the statutory dynamic between tort immunity for employers' and workmen's compensation.

or upgraded compensation cases. As such, they hardly can be viewed as a tax, as generally defined.

B. Even if Contributions Under Section 44(c)(2) Constitute Taxation, Tax Exemption Does Not Apply

If the contribution into the special fund is not a tax, then there is no statutory exemption shielding WMATA from liability. However, even if the contribution were to be viewed as a tax, the statutory exemption would not apply in this case, based on the controlling statutory construction, legislative history, judicial interpretation and congressional policy.

1. Statutory Construction

By its very terms, the exemption does not shield WMATA from liability under LHWCA § 44(c)(2). It only protects WMATA from taxes and assessments[7] on its property, its activities or its revenues. Contrary to defendant's position, this is not an all-inclusive exemption, but rather one which is limited to specified areas. This is not to say that an exemption from taxes on property, activities and revenues is not abroad exemption. Such an exemption, however, is not so broad so as to preclude any taxation whatsoever. This statutory construction is consistent with the approach employed in this Circuit:

> An intention on the part of the legislature to grant an exemption from the taxing powers of the state will never be implied from language which will admit of any other reasonable construction.

Washington Chapter of American Institute of Banking v, *District of Columbia,* 203 F.2d 68, 70 (D.C. Cir. 1953). Therefore, the payments to the special fund, even if con-

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[7] The Court treats the statutory use of the word "assessments" as signifying only a localized liability, Denver v. Train, 235 P. 777, and thus focuses its attention solely on whether a tax exemption exists.

sidered a tax, are not included in the exemption because the payments are not taxation of property, activities or revenues.

2. Legislative History

The legislative history on the statutory sections under consideration underscores that the intention of Congress was *not* to exempt WMATA from making contributions into the fund. The House Judiciary Committee Report provides in part:

> *Section 78. Tax Exemption.* - Declares that the creation of the Authority and its purposes are for the benefit of the people of the signatory States and is for a public purpose and that the Authority and the Board will be performing governmental functions. Provides further that the property, activities, and revenues of the Authority and of the Board shall be exempt from all Federal, State, District of Colombia, municipal, and local taxation.

H.R. Rep. 89-1914, 89th Cong., 2d Sess. (1966).

Although the legislative history reiterates that the purpose of the Compact is to benefit the public, it also emphasizes that the exemption is not absolute, but is limited to property, activities, and revenues of WMATA. Congress easily could have provided a blanket exemption but it chose not to do so. The section 44(c)(2) contributions are an example of payments that do not qualify for exemption under WMATA Compact § 78.

3. Judicial Interpretation

Cases construing tax exemptions in similar contexts have reasoned that workmen's compensation acts requiring contributions to finance the operation of the program do not permit exceptions to the contribution requirement, even where the exception is sought by a tax-exempt organiza-

tion. In *Port Authority of Alleghany County* v. *Smith,* 33 Pa. Commw. 410, 382 A.2d 153 (1978), a state workmen's compensation act required all insurers or self-insurers to contribute an annual assessment into a fund in order to finance the state workmen's compensation program. The Port Authority, which was exempt by statute from paying "any taxes or assessments upon any property acquired or used by it," paid the assessment under protest. After a Department of Labor Hearing Examiner determined that the legislature intended all insurers without exception to contribute into the fund, the Port Authority appealed to the Pennsylvania Commonwealth Court. Based on its application of statutory construction, the state court affirmed the decision of the Hearing Examiner. The statutory construction employed by the Pennsylvania court, 382 A.2d 155, is instructive for present purposes:

> [T]he legislature did not exempt an authority from paying *all* taxes or assessments, but only those taxes or assessments upon *property acquired or used* by [it]. . . . The assessment payable here is calculated upon the total amount of compensation paid by each insurer or self-insurer in a given calendar year. . . . [W]e fail to see how this assessment is an assessment upon port authority property acquired or used in connection with any of [its] authorized purposes. . . . (citations omitted).

In further response to the contention that immunity should attach based on the rule that public property devoted to public uses is immune from taxation absent a statute clearly expressing legislative intent that it shall not be immune, the court reasoned:

> First, we are not construing a taxing statute in this case. In issue here is a provision . . designed to relieve the general funds of the Commonwealth from the burden of costs in

> administering a humanitarian measure. Second, even if [the assessment] were to be viewed as a taxing statute, [it] cannot be said to impose a tax upon public property devoted to the authorized public purposes of the Port Authority. The assessment assessed here is upon the total amount of compensation paid by an insurer or self-insurer, which amount does not constitute "public property" as that concept has been enunciated in the case law cited.

Id. The two quoted passages illustrate not only that the exemption enjoyed by WMATA is not all-inclusive, but also that it is insufficient in this case to insulate WMATA from contributing to the workmen's compensation fund.[8]

4. Congressional Policy

The Court also notes that permitting WMATA an exemption from contributing to the special fund is inconsistent with congressional policy. The purpose of paying benefits out of the fund is to spread the costs among all employer's insurers. Had WMATA not been self-insured, its insurer would have had to contribute to the fund. All the other participants' liabilities are increased due to

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[8] Defendant places reliance on In re Pan American Paper Mills, Inc., 618 F.2d 159 (1st Cir. 1980). The issue in Pan American was whether compulsory workmen's compensation of the type existing in this case constituted a tax under the Bankruptcy Act. The court held that such payments were a tax because they were a "pecuniary obligation to defray the expenses of government." Defendant urges that Pan American should govern the resolution of the present case. However, the Court notes, first, that Pan American is factually and legally distinguishable and, second, that Pan American and every case which has cited it involved the definition of "tax" in the specific context of the Bankruptcy Act. *See, e.g.*, In re Payne, 27 Bankr. 809, 815 (D. Kan. 1983) (Pan American rejected a line of case holding that workmen's compensation contributions were not for a public purpose so as to constitute a tax, but rejected such cases only in the context of the bankruptcy act.

WMATA's refusal to pay. The Court concludes that WMATA's refusal is in contravention of the statutory requirement that "[b]y insuring and keeping insured the payment of compensation under this chapter, *the employer shall secure the payment of compensation.*" 33 U.S.C. § 932(a)(1) (emphasis added).

Moreover, WMATA has abided by its other responsibilities under the LHWCA. It has not asserted that it is exempt from *direct* liabilities to workers in the case of injury, *see* 33 U.S.C. §§ 907-909 and 910(f), attorney's fees, *see* 33 U.S.C. § 928, or liability imposed by statute for mishandling claims, *see* 33 U.S.C. §§ 914(g) and 930(e). Liability under § 944(c)(2) is merely an extension of these direct liabilities under the statute for employment-related injuries and death. Therefore, section 44(c)(2) assessments are no more taxes or assessments than are those parts of employers' and carriers' workmen's compensation liabilities owed directly to injured workers, their survivors and their medical care providers.

III.

CONCLUSION

For the reasons articulated above, the Court concludes that the assessment against WMATA under the LHWCA is not a tax and that, even if it is viewed as a tax, it is not within the purview of the tax exemption provided by the WMATA Compact. The plaintiff's motion for summary judgment should be granted. As is obvious from the body of this opinion, WMATA is not entitled to reimbursement for any amounts it has contributed to the fund in the past. An appropriate order accompanies this Memorandum Opinion.

Entered: July 19, 1985

/s/ BARRINGTON D. PARKER
BARRINGTON D. PARKER
United States District Judge

APPENDIX D

Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§901-950 (1982).

The following sections are reprinted:

§905 Exclusiveness of Liability
(a) Employer Liability

§907 Medical Services and Supplies
(a) General Requirement
(b) Physician Selection
(e) Physical Examination

§908 Compensation for disability

(f) Injury increasing disability
(g) Maintenance for employees undergoing vocational rehabilitation

§910 Determination of Pay
(h) Adjustment of Compensation

§918 Collection of Defaulted payments; Special Fund

§932 Security for Compensation

§ 905. Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

§ 907. Medical services and supplies

(a) General requirement

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

(b) Physician selection; administrative supervision; change of physicians and hospitals

The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical

care under this chapter as hereinafter provided. If, due to the nature of the injury, the employee is unable to select this physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him. The Secretary shall actively supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered to injured employees, shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may, on his own initiative or at the request of the employer, order a change of physicians or hospitals when in his judgment such change is desirable or necessary in the interest of the employee or where the charges exceed those prevailing within the community for the same or similar services or exceed the provider's customary charges. Change of physicians at the request of employees shall be permitted in accordance with regulations of the Secretary.

(e) Physical examination; medical questions; report of physical impairment; review or reexamination; costs

In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate. Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary. The Secretary shall order such review or reexamination unless he finds that it is clearly unwarranted. Such review or reexamination shall be completed within two weeks from the date ordered unless the Secretary finds that because of extraordinary circumstances a longer period is required. The Secretary shall have the power in his discretion to charge the cost of examination or review under this subsection to the employer, if he is a self-

insurer, or to the insurance company which is carrying the risk, in appropriate cases, or to the special fund in section 944 of this title.

§ 908. Compensation for disability

(f) Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subsection (c)(1)–(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subsection (c)(1)–(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that

section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation for one hundred and four weeks only.

(2)(A) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of this title, except that the special fund shall not assume responsibility with respect to such benefits (and such payments shall not be subject to cessation) in the case of any employer who fails to comply with section 932(a) of this title.

(B) After cessation of payments for the period of weeks provided for in this subsection, the employer or carrier responsible for payment of compensation shall remain a party to the claim, retain access to all records relating to the claim, and in all other respects retain all rights granted under this chapter prior to cessation of such payments.

(3) Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim

by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

(g) Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the Secretary as provided by section 939(c) of this title, is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $25 a week. The expense shall be paid out of the special fund established in section 944 of this title.

§ 910. Determination of pay

(h)(1) Not later than ninety days after October 27, 1972, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to October 27, 1972, shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 906(b) of this title and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following October 27, 1972, and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on October 27, 1972; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on October 27, 1972. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded com-

pensation as the result of death or permanent total disability at less than the maximum ate that was provided in this chapter at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following October 27, 1972. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment require by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 944 of this title, and 50 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) of this section an injury which resulted in permanent total disability or death which occurred prior to October 27, 1972, shall be considered to have occurred on the day following such date.

§ 918. Collection of defaulted payments; special fund

(a) In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or[1] a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this title, the deputy commissioner

[1] So in original. Probably should read "for".

shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District court for the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

(b) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 944 of this title, make payment from such fund upon any award made un-

der this chapter, and in addition, provide any necessary medical, surgical, and other treatment required by section 907 of this title in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of labor under this subsection; and for the purpose of enforcing this liability, the Secretary of labor for the benefit of the fund shall be subrogated to all the rights of the person receiving such payment or benefits as against the employer and may be a proceeding in the name of the Secretary of Labor under this section or under subsection (c) of section 921 of this title, or both, seek to recover the amount of the default or so much thereof as in the judgment of the Secretary is possible, or the Secretary may settle and compromise any such claim.

(Mar. 4, 1927, c. 509, § 18, 44 Stat. 1434; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; July 26, 1956, c. 735, § 6, 70 Stat. 655; Sept. 28, 1984, Pub.L. 98-426, § 27(b), 98 Stat. 1654.)

§ 932. Security for compensation

(a) Every employer shall secure the payment of compensation under this chapter—

(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this chapter; or

(2) By furnishing satisfactory proof to the Secretary of his financial ability to pay such compensation

and receiving an authorization from the Secretary to pay such compensation directly. The Secretary may, as a condition to such authorization, require such employer to deposit in a depository designated by the Secretary either an indemnity bond or securities (at the option of the employer) of a kind and in an amount determined by the Secretary, based on the employer's financial condition, the employer's previous record of payments, and other relevant factors, and subject to such conditions as the Secretary may prescribe, which shall include authorization to the Secretary in case of default to sell any such securities sufficient to pay compensation awards or to bring suit upon such bonds, to procure prompt payment of compensation under this chapter. Any employer securing compensation in accordance with the provisions of this paragraph shall be known as a self-insurer.

(b) In granting authorization to any carrier to insure payment of compensation under this chapter the Secretary may take into consideration the recommendation of any State authority having supervision over carriers or over workmen's compensation, and may authorize any carrier to insure the payment of compensation under this chapter in a limited territory. Any marine protection and indemnity mutual insurance corporation or association, authorized to write insurance against liability for loss or damage from personal injury and death, and for other losses and damages, incidental to or in respect of the ownership, operation, or chartering of vessels on a mutual assessment plan, shall be deemed a qualified carrier to insure compensation under this chapter. The Secretary may suspend or revoke any such authorization for good cause shown after a hearing at which the carrier shall be entitled to be heard in person or by counsel and to present evidence.

No suspension or revocation shall affect the liability of any carrier already incurred.

(Mar. 4, 1927, c. 509, § 32, 44 Stat. 1439; Sept. 28, 1984, Pub.L. 98-426, §§ 20, 27(a)(2), 98 Stat. 1652, 1654.)

APPENDIX E

Washington Metropolitan Area Transit Authority Compact
(Pub. L. No. 89-774, 80 Stat. 1324 (1966))
Article IX, Revenue Bonds
Sections 27-48

Article IX

Revenue Bonds

Borrowing Power

27. The Authority may borrow money for any of the purposes of this Title, may issue its negotiable bonds and other evidences of indebtedness in respect thereto and may mortgage or pledge its properties, revenues and contracts as security therefor.

All such bonds and evidences of indebtedness shall be payable solely out of the properties and revenues of the Authority. The bonds and other obligations of the Authority, except as may be otherwise provided in the indenture under which they were issued, shall be direct and general obligations of the Authority and the full faith and credit of the Authority are hereby pledged for the prompt payment of the debt service thereon and for the fulfillment of all other undertakings of the Authority assumed by it to or for the benefit of the holders thereof.

Funds and Expenses

28. The purposes of this Title shall include, without limitation, all costs of any project or facility or any part thereof, including interest during a period of construction and for a period not to exceed two years thereafter and any incidental expenses (legal, engineering, fiscal, financial, consultant and other expenses) connected with issuing and disposing of the bonds; all amounts required for the

creation of an operating fund, construction fund, reserve fund, sinking fund, or other special fund; all other expenses connected with administration, the planning, design, acquisition, construction, completion, improvement or reconstruction of any facility or any part thereof; and reimbursement of advances by the Board or by others for such purposes and for working capital.

Credit Excluded; Officers, State, Political Subdivisions and Agencies

29. The Board shall have no power to pledge the credit of any signatory party, political subdivision or agency thereof, or to impose any obligation for payment of the bonds upon any signatory party, political subdivision or agency thereof, but may pledge the contracts of such governments and agencies; provided, however, that the bonds may be underwritten in whole or in part as to principal and interest by the United States, or by any political subdivision or agency of any signatory; provided, further, that any bonds underwritten in whole or in part as to principal and interest by the United States shall not be issued without approval of the Secretary of the Treasury. Neither the Directors nor any person executing the bonds shall be liable personally on the bonds of the Authority or be subject to any personal liability or accountability by reasons of the issuance thereof.

Funding and Refunding

30. Whenever the Board deems it expedient, if may fund and refund the bonds and other obligations of the Authority whether or not such bonds and obligations have matured. It may provide for the issuance, sale or exchange of refunding bonds for the purpose of of redeeming or retiring any bonds (including the payment of any premium, duplicate interest or each cash adjustment required in connection therewith) issued by the Authority or issued by

any other issuing body, the proceeds of the sale of which have been applied to any facility acquired by the Authority or which are payable out of the revenues of any facility acquired by the Authority. Bonds may be issued partly to refund bonds and other obligations then outstanding, and partly for any other purpose of the Authority. All provisions of this Title applicable to the issuance of bonds are applicable to refunding bonds and to the issuance, sale or exchange thereof.

Bonds; Authorization Generally

31. Bonds and other indebtedness of the Authority shall be authorized by resolution of the Board. The validity of the authorization and issuance of any bonds by the authority shall not be dependent upon nor affected in any way by: (i) the deposition of bond proceeds by the Board or by contract, commitment or action taken with respect to such proceeds; or (ii) the failure to complete any part of the project for which bonds are authorized to be issued. The Authority may issue bonds in one or more series and may provide for or more consolidated bond issues, in such principal amounts and with such terms and provisions as the Board may deem necessary. The bonds may be secured by a pledge of all or any part of the property, revenues and franchises under its control. Bonds may be issued by the Authority in such amount, with such maturities and in such denominations and form or forms, whether coupon or registered, as to principal alone or as to both principal and interest, as may be determined by the Board. The Board may provide for redemption of bonds prior to maturity on such notice and at such time or times and with such redemption provisions, including premiums, as the Board may determine.

Bonds; Resolutions and Indentures Generally

32. The Board may determine and enter into indentures or adopt resolutions providing for the principal amount,

date or dates, maturities, interest rate, or rates, denominations, form, registration, transfer, interchange and other provisions of the bonds and coupons and the terms and conditions upon which the same shall be executed, issued, secured, sold, paid, redeemed, funded and refunded. The resolution of the Board authorizing any bond or any indenture so authorized under which the bonds are issued may include all such covenants and other provisions not inconsistent with the provisions of this Title, other than any restriction on the regulatory powers vested in the Board by this Title, as the Board may deem necessary or desirable for the issue, payment, security, protection or marketing of the bonds, including without limitation covenants and other provisions as to the rates or amounts of fees, rents and other charges to be charged or made for use of the facilities; the use, pledge, custody, securing, application and disposition of such revenues, of the proceeds of the bonds, and of any other moneys or contracts of the Authority; the operation, maintenance, repair and reconstruction of the facilities and the amounts which may be expended therefor; the sale, lease or other disposition of the facilities; the insuring of the facilities and of the revenues derived therefrom; the construction or other acquisition of other facilities; the issuance of additional bonds or other indebtedness; the rights of the bondholders and of any trustee for the bondholders upon default by the Authority or otherwise; and the modification of the provisions of the indenture and of the bonds. Reference on the face of the bonds to such resolution or indenture by its date of adoption or the apparent date on the face thereof is sufficient to incorporate all of the provisions thereof and of this Title into the body of the bonds and their appurtenant coupons. Each taker and subsequent holder of the bonds or coupons, whether the coupons are attached to or detached from the bonds, has recourse to all of the provisions of the indenture and of this Title and is bound thereby.

Maximum Maturity

33. No bond or its terms shall mature in more than fifty years from its own date and in the event any authorized issue is divided into two or more series or divisions, the maximum maturity date herein authorized shall be calculated from the date on the face of each bond separately, irrespective of the fact that different dates may be prescribed for the bonds of each separate series or division of any authorized issue.

Tax Exemption

34. All bonds and all other evidences of debt issued by the Authority under the provisions of this title and the interest thereon shall at all times be free and exempt from all taxation by or under authority of any signatory parties, except for transfer, inheritance and estate taxes.

Interest

35. Bonds shall bear interest at such rate or rates as may be determined by the Board, payable annually or semi-annually.

Place of Payment

36. The Board may provide for the payment of the principal and interest of bonds at any place or places within or without the signatory states, and in any specified lawful coin or currency of the United States of America.

Execution

37. The Board may provide for the execution and authentication of bonds by the manual, lithographed or printed facsimile signature of members of the Board, and by additional authentication by a trustee or fiscal agent appointed by the Board; provided, however, that one of such signatures shall be manual. If any of the members

whose signatures or countersignatures appear upon the bonds or coupons cease to be members before the delivery of the bonds or coupons, their signatures or countersignatures are nevertheless valid and of the same force and effect as if the members had remained in office until the delivery of the bonds and coupons.

Holding Own Bonds

38. The Board shall have power out of any funds available therefor to purchase its bonds and may hold, cancel or resell such bonds.

Sale

39. The Board may fix terms and conditions for the sale or other disposition of any authorized issue of bonds. The Board may sell bonds at less than their par or face value but no issue of bonds may be sold at an aggregate price below the par or face value thereof if such sale would result in a net interest cost to the Authority calculated upon the entire issue so sold in excess of the applicable rate determined by the Board, payable semiannually, computed with relation to the absolute maturity of the bonds according to standard tables of bond values, deducting the amount of any premium to be paid on the redemption of any bonds prior to maturity. All bonds issued and sold pursuant to this Title may be sold in such manner, either at public or private sale, as the Board shall determine.

Negotiability

40. All bonds issued under the provisions of this Title are negotiable instruments.

Bonds Eligible for Investment and Deposit

41. Bonds issued under the provisions of this Title and hereby made securities in which all public officers and

public agencies of the signatories and their political subdivisions and all banks, trust companies, savings and loan associations, investment companies and others carrying on a banking business, all insurance companies and insurance associations and others carrying on an insurance business, all administrators, executors, guardians, trustees and other fiduciaries, and all other persons may legally and properly invest funds, including capital in their control or belonging to them. Such bonds are hereby made securities which may properly and legally be deposited with and received by any officer of any signatory, or of any agency or political subdivision of any signatory, for any purpose for which the deposit of bonds or other obligations of such signatory is now or may hereafter be authorized by law.

Validation Proceedings

42. Prior to the issuance of any bonds, the Board may institute a special proceeding to determine the legality of proceedings to issue the bonds and their validity under the laws of any of the signatory parties. Such proceeding shall be instituted and prosecuted in rem and the final judgment rendered therein shall be conclusive against all persons whomsoever and against each of the signatory parties.

Recording

43. No indenture need be recorded or filed in any public office, other than the office of the Board. The pledge of revenues provided in any indenture shall take effect forthwith as provided therein and irrespective of the date of receipt of such revenues by the Board of the indenture trustee. Such pledge shall be effective as provided in the indenture without physical delivery of the revenues to the Board or to the indenture trustee.

Pledged Revenues

44. Bond redemption and interest payments shall, to the extent provided in the resolution or indenture, constitute a first, direct and exclusive charge and lien on all revenues received from the use and operation of the facility, and on any sinking or other funds created therefrom. All such revenues, together with interest thereon, shall constitute a trust fund for the security and payment of such bonds and except as and to the extent provided in the indenture with respect to the payment therefrom of expenses for other purposes including administration, operation, maintenance, improvements or extensions of the facilities or other purposes shall not be used or pledged for any other purpose so long as such bonds, or any of them, are outstanding and unpaid.

Remedies

45. The holder of any bond may for the equal benefit and protection of all holders of bonds similarly situated; (1) by mandamus or other appropriate proceedings require and compel the performance of any of the duties imposed upon the Board or assumed by it, its officers, agents or employees under the provisions of any indenture, in connection with the acquisition, construction, operation, maintenance, repair, reconstruction or insurance of the facilities, or in connection with the collection, deposit, investment, application and disbursement of the revenues derived from the operation and use of the facilities, or in connection with the deposit, investment and disbursement of the proceeds received from the sale of bonds; or (2) by action or suit in a court of competent jurisdiction of any signatory party require the Authority to account as if it were the trustee of an express trust, or enjoin any acts or things which may be unlawful or in violation of the rights of the holders of the bonds. The enumeration of such rights and remedies does not, however, exclude the exercise or pros-

ecution of any other rights or remedies available to the holders of bonds.

Article X

Equipment Trust Certificates

Power

46. The Board shall have power to execute agreements, leases and equipment trust certificates with respect to the purchase of facilities or equipment such as cars, trolley buses and motor buses, or other craft, in the form customarily used in such cases and appropriate to effect such purchase, and may dispose of such equipment trust certificates in such manner as it may determine to be for the best interests of the Authority. Each vehicle covered by an equipment trust certificate shall have the name of the owner or lessor plainly marked upon both sides thereof, followed by the words "Owner and Lessor."

Payments

47. All monies required to be paid by the Authority under the provisions of such agreements, leases and equipment trust certificates shall be payable solely from the revenue to be derived from the operation of the transit system or from such grants, loans, appropriations or other revenues, as may be available to the Board under the provisions of this title. Payment for such facilities or equipment, or rentals thereof, may be made in installments, and the deferred installments may be evidenced by equipment trust certificates as aforesaid, and title to such facilities or equipment may not vest in the Authority until the equipment trust certificates are paid.

Procedure

48. The agreement to purchase facilities or equipment by the Board may direct the vendor to sell and assign the

equipment to a bank or trust company, duly authorized to transact business in any of the signatory States, or to the Housing and Home Finance Administrator, as trustee, lessor or vendor, for the benefit and security of the equipment trust certificates and may direct the trustee to deliver the facilities and equipment to one or more designated officers of the Board and may authorize the trustee simultaneously therewith to execute and deliver a lease of the facilities or equipment to the Board.

Supreme Court, U.S.
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No. 86-1080

In the Supreme Court of the United States

OCTOBER TERM, 1986

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, PETITIONER

v.

WILLIAM R. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Washington Area Metropolitan Transit Authority may be required to contribute to a statutory workers' compensation fund that assumes part of individual employers' liabilities to workers injured before mid-1982 in certain cases arising in the District of Columbia.

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In the Supreme Court of the United States

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No. 86-1080

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, PETITIONER

v.

WILLIAM R. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 796 F.2d 481. The opinion of the district court (Pet. App. 22a-31a) is reported at 614 F. Supp. 1419.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1986, and rehearing was denied on October 2, 1986 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on December 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As presently applicable to injuries to employees occurring on or before July 26, 1982, the District of Columbia Workmen's Compensation Act, ch. 612, §§ 1-2, 45 Stat. 600, formerly codified at D.C. Code Ann. §§ 36-501 to 36-502 (1973) (DCWCA), extends the workers' compensation protection of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (1982 ed.) 901 *et seq.*, to all employees in the District of Columbia for all work-related injuries or deaths.[1] The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (1982 ed.) 901 *et seq.*, as it continues to be applicable to such injuries, provides injured workers with guaranteed workers' compensation for work-related injuries.[2] Under the Longshoremen's Act, every cov-

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[1] The District of Columbia enacted a new workers' compensation law, D.C. Code Ann. §§ 36-301 *et seq.* (1981 & Supp. 1986), pursuant to "home rule" authority granted to the District of Columbia by Pub. L. No. 93-198, 87 Stat. 774 *et seq.* As it deals with the issues raised here, the new law is generally similar to the Longshoremen's Act. While the new law became effective on July 26, 1982, for injuries after that date, employers continue to be liable for injuries arising out of work before that date under the earlier DCWCA. See Pet. App. 3a; 20 C.F.R. 701.101(b) (1986). The "special fund" obligation which is the subject of this case pertains to a fund used only to pay claims which arose before the effective date of the new law.

[2] The Longshoremen's and Harbor Workers' Compensation Act was amended in 1984 by Pub. L. No. 98-426, 98 Stat. 1639 *et seq.*, and retitled the Longshore and Harbor Workers' Compensation Act (33 U.S.C. (Supp. II) 901 *et seq.*). The provisions of the Longshoremen's Act, as they existed in 1982, continue to apply to claims derived from injuries occurring before the effective date of the 1982 D.C. law. *Keener* v. *Washington Metropolitan Area Transit Authority*, 800 F.2d

ered employer is "liable for and shall secure the payment to his employees of [workers'] compensation." 33 U.S.C. 904(a). An employer "secures" compensation either by purchasing an insurance policy or by obtaining permission from the Secretary of Labor to self-insure (33 U.S.C. 932(a); *Washington Metropolitan Area Transit Authority* v. *Johnson*, 467 U.S. 925, 928 (1984)).[3] In exchange for securing compensation—so that injured employees obtain the statutory disability compensation and other benefits—the employer is immune from employee tort suits for work-related injuries. See 33 U.S.C. 905, 907, 908, 909.

The Longshoremen's Act prescribes the amount of compensation to be paid for four classes of disability based on the extent and permanence of the disability. 33 U.S.C. 908. The Act also limits the amount the employer must pay in "second injury" cases—that is, where a partially disabled worker sustains an employment-related injury and the extent of the resulting permanent disability is greater than would have resulted absent the pre-existing disability, 33 U.S.C. 908(f).[4] After the employer has paid compensation

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1173, 1175 (D.C. Cir. 1986), cert. denied, No. 86-1181 (Mar. 9, 1987). Therefore, like petitioner, we refer here to the pre-amendment Longshoremen's Act. However, if a specific section of that Act has been changed by the 1984 Longshore Act, we have so indicated by including the year in the citation (*e.g.*, 33 U.S.C. (1982 ed.) 944(i)).

[3] Petitioner has been self-insured under 33 U.S.C. 932(a) since 1973 (Pet. App. 24a). Hereafter, references to "employers" include the approved insurance carriers of those employers who are not self-insured.

[4] As petitioner explains (Pet. 18-19), if a person who had lost one eye in an earlier accident lost his other eye in a

for—typically—104 weeks of permanent disability,[5] the remainder of the compensation due for the permanent disability is paid out of a "special fund" established by 33 U.S.C. 944.[6] 33 U.S.C. 908(f).

The special fund's primary intended purpose is to minimize any disincentive for employers to hire disabled workers by eliminating the risk that the employer will have to bear all of the worker's loss from a work-related injury sustained while in that employer's service. See *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 202 (1949).[7] The special fund spreads the cost of relieving employers of full liability in second injury cases; it is financed in major part by contributions from employers subject to the Act, according to pro-rated assessments made by the Secretary of Labor. 33 U.S.C. (1982 ed.) 944(c)

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second accident, he would then be entitled to disability compensation due a blind person, considerably greater than that due for loss of one eye.

[5] The employer pays all compensation for the disability during any period of medical recovery (33 U.S.C. 908(f)), and pays medical benefits indefinitely (33 U.S.C. 907).

[6] The new District of Columbia workers' compensation law (see note 1, *supra*) establishes a new "special fund" for injuries occurring after its effective date of July 26, 1982. D.C. Code Ann. § 36-340 (1981).

[7] Approximately 90 percent of the monies in the special fund are spent on compensation for second injury victims (Pet. App. 3a). Other payments from the fund include (33 U.S.C. (1982 ed.) 944(j)): (1) inflation-indexed increases in compensation for pre-1972 injuries or deaths (33 U.S.C. 910(h)); (2) medical examinations (33 U.S.C. 907(e)); (3) defaults in payment due to employer insolvency (33 U.S.C. (1982 ed.) 918(b)); and (4) additional compensation for injured workers undergoing vocational rehabilitation (33 U.S.C. 908(g)).

(2).[8] The amount of each employer's contribution is based upon a formula set out in Section 44(c)(2) and 20 C.F.R. 702.146(c) (1982). Pet. App. 4a. After first estimating the expenses of the fund for the coming year, the Secretary of Labor calculates for each employer the ratio of: (1) its direct payments[9] under the Act made during the previous year; and (2) the total direct payments made under the Act by *all* employers during the same period. Each employer's contribution to the special fund is then set at the calculated fraction of the total estimated fund liabilities for the upcoming year, so that each bears the same proportionate share of projected special fund liabilities as that employer's share of the total direct compensation liabilities for the previous year. Pet. App. 4a; 20 C.F.R. 702.146(c) (1982).

The special fund is segregated from general revenues: "all monies and securities in such fund shall be held in trust by [the] Treasurer [of the United States] and shall not be money or property of the United States" (33 U.S.C. 944(a)). Further, neither the United States nor the Secretary of Labor is liable for payments in amounts greater than the proceeds contained in the fund (33 U.S.C. (1982 ed.) 944 (g)), and payments may be made only for purposes specified in the Longshoremen's Act itself (33 U.S.C. (1982 ed.) 944 (j)).

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[8] The 1984 Longshore Act amendments make some changes, not applicable here, in the methods for calculating contributions to the fund (see 33 U.S.C. (Supp. II) 944(c)(2); note 2, *supra*).

[9] These direct payments are the compensation that the employer has itself paid to injured workers (see 33 U.S.C. (1982 ed.) 944(c)(2)), apart from the liabilities assumed by the special fund.

2. Petitioner, Washington Metropolitan Area Transit Authority (WMATA), is an agency established by an interstate compact entered into by the District of Columbia, Maryland and Virginia [10] to operate a rapid transit system and other public transportation facilities and services in the Washington, D.C. area. Pet. App. 22a. Under the WMATA Compact, petitioner is liable for torts committed by its employees and agents in the conduct of any proprietary function. WMATA Compact, Section 80. Petitioner has consistently maintained that as an employer in the District of Columbia, it is subject to and covered by the Longshoremen's Act, as extended by the DCWCA, for all work-related injuries sustained by its workers before July 26, 1982. Pet. App. 3a, 23a; Pet. 10. Pursuant to the DCWCA, it has obtained permission to act as a self-insurer (Pet. App. 24a); paid workers' compensation benefits (*id.* at 3a); and asserted its right to the statutory limitation on benefit payments in second injury cases (Pet. 10; Pet. App. 3a).

From 1974 until mid-1982, petitioner paid its contributions to the special fund (Pet. App. 2a, 4a). At that juncture, however, it notified the Secretary that it would no longer make payments into the special fund, and demanded a refund of its payments over the past decade, asserting (*ibid.*) that Section 78 of the WMATA Compact immunizes it from such assessments. That section provides that petitioner shall not be required to pay federal, state, or District of Columbia "taxes or assessments upon any of the property acquired by it * * * or upon its activities in

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[10] Washington Metropolitan Area Transit Authority Interstate Compact, codified as amended at D.C. Code Ann. §§ 1-2431 to 1-2441 (1981).

the operation and maintenance of any transit facilities or upon any revenue therefrom * * *."

The Secretary has continued to make payments from the special fund to injured WMATA employees. In 1984 these payments were approximately $446,000. Pet. App. 10a n.7.

3. The Secretary of Labor commenced this action to collect the overdue contributions from petitioner (see 33 U.S.C. 944(i)), and petitioner counterclaimed for a refund of its past special fund contributions.[11] The district court granted summary judgment for the Secretary, holding that the WMATA Compact tax exemption does not include petitioner's contributions to the special fund. Pet. App. 2a, 22a, 30a. The court reasoned that petitioner's payments to the fund are not taxes within the meaning of Section 78 of the WMATA Compact because they are not intended to finance general public expenses, but rather "to supply a specific fund with a specific purpose." Pet. App. 24a-26a. Further, even if the assessment is viewed as a tax, it is not within the purview of the WMATA Compact exemption because it is not a tax on petitioner's "property, activities [or] revenues," the categories to which Section 78 of the Compact limits the exemption. Pet. App. 26a-27a. The court noted that "Congress easily could have provided a blanket exemption but chose not to do so." *Id.* at 27a.

The district court observed that to exempt petitioner from contributing to the special fund would be inconsistent with congressional policy, since the purpose of the fund is to spread second injury costs

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[11] Petitioner's obligation to make payment under the new D.C. workers' compensation law, applicable to injuries occurring on or after July 26, 1982, is not an issue in this case.

among all covered employers. Thus, "[a]ll the other participants' liabilities are increased due to WMATA's refusal to pay * * * [and] WMATA's refusal is in contravention of the statutory requirement that * * * 'the employer shall secure the payment of compensation'" (Pet. App. 29a-30a (quoting 33 U.S.C. 932; emphasis omitted)).

4. The court of appeals affirmed, holding that petitioner "enjoys neither constitutional nor compact immunity from the obligation to make payments to the Fund" (Pet. App. 2a). Petitioner is not entitled to constitutional intergovernmental tax immunity because the special fund is a user fee rather than a prohibited tax under the definition of user fee set out in *Massachusetts* v. *United States*, 435 U.S. 444 (1978). Pet. App. 2a-3a, 6a-7a. In that decision's language joined by a majority of the Court, "a State can have no constitutional objection to a revenue measure * * * [s]o long as the charges do not discriminate against state functions, are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied" (435 U.S. at 466-467).

The court noted (Pet. App. 8a-9a) that petitioner made no contention as to the two aspects of this test concerning discrimination against state functions and assessment of excessive contributions. Petitioner's only contention was that there was no "fair approximation" of its share of the cost, because its contributions exceeded the payout to its injured employees. Noting that the statistics upon which petitioner based this claim were so ambiguous that there was "some doubt about [the claim's] accuracy * * * as a factual matter" (Pet. App. 9a & n.7), the court

concluded that in any event, the *Massachusetts* test was satisfied. It reasoned that the method used in determining an employer's contribution to the fund is rationally designed to approximate prospective payments by the fund to petitioner's employees (Pet. App. 10a), and thus "bear[s] a fair relation to the benefit" received by petitioner (*id.* at 10a-11a). According to the court, employers who made greater direct payments in the previous year are likely to be those having "more employees, more handicapped employees, less safe working conditions, or some combination of these three characteristics." *Id.* at 11a-12a. Moreover, the court observed, petitioner, like other employers, receives indirect benefits from the fund over and above actual payouts to its workers, including freedom from tort liability, more productive employees, and the increased incentive to other employers to hire partially disabled former WMATA workers, thus reducing petitioner's compensation costs. *Ibid.*

The court of appeals also concluded that petitioner's payment to the special fund "is properly regarded not as a tax from which [Section 78 of] the Compact exempts WMATA, but as a fee attendant to regulation." Pet. App. 6a-7a. Analyzing the language of Section 78, the court concluded that "a levy is properly defined as a 'tax' within the meaning of [that provision] when its principal purpose is to raise revenue, not to regulate activities" (Pet. App. 15a). The court noted the distinction between money raised for the general support of the government and money raised for the uses of a particular regulatory statute, citing, inter alia, the *Head Money Cases*, 112 U.S. 580 (1884), and quoted the observation in *South Carolina ex rel. Tindal* v. *Block*, 717 F.2d 874, 887 (4th Cir.

1983), cert. denied, 465 U.S. 1080 (1984), that "[i]f regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax" (Pet. App. 16a). Since the central purpose of the workers' compensation scheme, of which the special fund is an integral part, is to determine and assure prompt payment of employers' liabilities for industrial accidents, it concluded that the employer contributions to the fund are more like tort awards than revenue-raising taxes. *Id.* at 16a-17a.

ARGUMENT

The issues presented by this case are, first, whether the contributions due from petitioner to the special fund fairly approximate the benefits it receives therefrom, so that there is no constitutional immunity under *Massachusetts* v. *United States*, *supra*; and second, whether Section 78 of the WMATA compact relieves petitioner of the obligation to contribute. Neither issue merits review by this Court. The disputed questions concern only the participants in the WMATA Compact, and even they are affected only as to compensation payable to individuals who were injured before July 26, 1982.[12] In any event, review is not merited because the courts below correctly rejected petitioner's claims.

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[12] As petitioner notes (Pet. 22 n.4), the Longshore Act employs a somewhat different formula for determining special fund assessments. Accordingly, a decision in this case would not be directly applicable to similar issues that might arise under that Act. Moreover, the new District of Columbia workers' compensation statute is also somewhat different than the statutes involved here (see note 1, *supra*); questions concerning the scope and applicability of that statute should be resolved in a case arising under it.

1. States have no immunity from nondiscriminatory revenue measures that operate as user fees, since such measures do not threaten state sovereignty, but "operate[] only to ensure that each member of a class of special beneficiaries of a federal program pay[s] a reasonable approximation of its fair share of the cost of the program to the National Government" (*Massachusetts* v. *United States*, 435 U.S. at 454 (plurality opinion)). Petitioner's contribution to the special fund is clearly such a permissible user fee.[13] In this Court (Pet. 29), as below (Pet. App. 8a-9a) petitioner does not dispute that the special fund contribution system does not discriminate against state functions, and is designed to produce total revenues that equate with the total federal expenditures (see page 5, *supra*). Petitioner asserts only that the *Massachusetts* test is not satisfied because the amounts petitioner is required to contribute are said to exceed

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[13] The court of appeals therefore found it unnecessary to consider other possible bases for rejecting petitioner's constitutional claim. It did, however, note (Pet. App. 7a n.6) that there is some uncertainty as to "whether the doctrine of state immunity from federal taxation retains any substantive content at all." Assuming it does, this Court has held in *Helvering* v. *Powers*, 293 U.S. 214 (1934), that the operation of a street railway is a proprietary function, and such functions have traditionally been held to be outside the scope of the state's immunity from taxation. We submit that since *Massachusetts* v. *United States*, *supra*, so plainly indicates that petitioner is entitled to no constitutional immunity because the challenged contributions are in the nature of user fees, there is no more need for this Court than for the court of appeals to consider in this case whether the state tax immunity doctrine survives, and if so, whether the distinction between "proprietary" and "essential" governmental functions remains relevant. Cf. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 539-545 (1985).

greatly the payouts to former WMATA employees (Pet. 29).[14] The accuracy of petitioner's analysis of the costs and benefits that have resulted from its participation in the scheme is highly questionable.[15] Assuming it is accurate, that analysis does not show a lack of "fair approximation" under the *Massachusetts* test.

The calculation of contributions based on the proportion of each employer's direct payments for the previous year is at least as closely related to the benefits that each employer can reasonably anticipate from the fund as the flat, weight-based aircraft registration fee was related to the civil aviation benefits in *Massachusetts* (435 U.S. at 446). And here, as there, "[a] more precisely calibrated formula * * * would, of course, be administratively more costly" (*id.* at 469). Compare Pet. App. 10a-12a. As the court of appeals noted (*id.* at 11a), the funding method selected can be expected to result in larger contributions to the fund by larger employers, and

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[14] Petitioner also suggests in passing (Pet. 29) that there is no limit on the purposes to which its contributions may be applied. This is plainly incorrect: the special fund is segregated from general revenues (33 U.S.C. 944(a)), and payments therefrom may be made only for the purposes specified in the Longshoremen's Act itself (33 U.S.C. (1982 ed.) 944(j)).

[15] In the first place, as the court below noted (Pet. App. 9a-10a n.7), the statistical basis for petitioner's claim is highly speculative—it may well be that the payouts to former WMATA employees have been substantially greater than petitioner assumes. In the second place, petitioner's argument ignores the fact that it receives other benefits from its participation in the fund beyond payouts to former employees—including, for example, protection from possible very large tort liability (Pet. App. 12a).

those with more vulnerable workers—precisely those employers that can also be expected to require the largest payouts from the fund.

Petitioner claims (Pet. 11, 17) that its contributions to the fund will necessarily rise as other employers settle pre-1982 injury claims, thus reducing their direct payouts and therefore their contributions to the fund. Even if petitioner is correct in predicting that other employers, but not petitioner, will settle cases and reduce their direct payments, that does not establish such an absence of relationship between costs and benefits that the contributions must be considered an unconstitutional tax rather than a user fee.

This statutory scheme, especially with its decreasing pool of beneficiaries suffering from pre-1982 injuries, and correspondingly decreasing fund payouts, simply poses no threat of the imposition of charges that will "unduly interfere with, or destroy a State's ability to perform essential services" (*Massachusetts*, 435 U.S. at 467 (language joined by majority of Court)).[16]

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[16] Petitioner makes much of the economic burden imposed by the required contribution, but, as the Court noted in *Massachusetts*, 435 U.S. at 465-466:

> a State has no constitutional complaint when it is required to pay the cost of benefits received * * * [and] even if the [system utilized] does cost it somewhat more than it would have to pay under a perfect user-fee system, there is still no interference with the values protected by the implied constitutional tax immunity of the States. The possibility of a slight overcharge is no more offensive to the constitutional structure than is the increase in the cost of essential operations that results either from the fact that those who deal with the State may be required to pay nondiscriminatory taxes on the money they receive or from the fact a jury may award an eminent domain claimant an amount in excess of what would be "just compensation" in an ideal system of justice.

2. Petitioner's contention that the tax exemption in the WMATA Compact excuses it from contributing to the special fund is equally without merit. The court of appeals analyzed the precise language of Section 78 of the Compact to determine the rationale for the tax exemption contained therein, and correctly concluded that the assessed contributions to the special fund do not constitute an exempt "tax or assessment" under that rationale, but are instead fees attendant to regulation.[17]

As the court of appeals explained (Pet. App. 14a-16a), a levy is not a "tax" within the meaning of Section 78 of the WMATA Compact when its primary purpose is to regulate activities, rather than to raise revenue for the general support of the government.[18] See, *e.g.*, *South Carolina ex rel. Tindal* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983), cert. denied, 465 U.S. 1080 (1984),[19] and other cases cited at Pet. App.

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[17] Petitioner apparently believes (Pet. 27-28) that the presence of the term "assessment" in the tax exemption provision should lead to a different result. But as petitioner itself recognizes (Pet. 24, 28), an "assessment" is simply a particular kind of tax. Cf. *Rambo* v. *United States*, 492 F.2d 1060, 1061 n.1 (6th Cir. 1974), cert. denied, 423 U.S. 1091 (1976). It is apparent that the term "assessment" is no broader than the term "tax," either in the Compact or in the cases cited by petitioner.

[18] It makes no difference that second injury funds exist in other states and that other statutes may sometimes characterize the contributions as "taxes" (see Pet. 18-19). It is the true nature of the contributions, not the name given them, that controls.

[19] Petitioner attempts to distinguish *South Carolina ex rel. Tindal* v. *Block*, *supra*, by arguing (Pet. 23-24) that the fee there was tantamount to a penalty. The Fourth Circuit, however, concluded that "[t]he clear language and structure" of the statute showed that the federal assessment on the commercial sale of milk was designed to regulate the production

16a. Section 78 of the Compact states that petitioner is created "for a public purpose" and "[*a*]*ccordingly*, [petitioner] shall not be required to pay taxes or assessments" (emphasis added). The "public purpose" of petitioner provides no basis for exempting it from regulatory fees.

The special fund is an integral part of the overall workers' compensation scheme, the primary purpose of which is to regulate employers' liabilities for industrial accidents. See *Washington Metropolitan Area Transit Authority* v. *Johnson*, 467 U.S. at 931-932. As the court below explained (Pet. App. 16a-17a), the workers' compensation scheme also indirectly regulates employer conduct by increasing contributions to the special fund when the employer's proportion of direct compensation liabilities increases.[20] In other words, "fees associated with the statute are better compared with tort awards than with revenue-raising taxes."[21] Pet. App. 17a.[22]

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of milk by reducing overproduction, and by spreading the financial burdens of the price support system. See 717 F.2d at 887.

[20] Petitioner mistakenly asserts (Pet. 21) that an employer's contribution does not depend on its workers' compensation experience. This is merely a variation on its factual argument that the assessment is not a fair approximation of the benefit received. See pages 12-13, *supra*.

[21] Section 5(a) of Pub. L. No. 89-774, 80 Stat. 1353 (codified at D.C. Code Ann. § 1-2440 (1981)), stating that all inconsistent United States or District of Columbia laws are amended to eliminate such inconsistencies, adds nothing to petitioner's position (see Pet. 16-17). If the required contributions to the special fund are not taxes within the meaning of the tax exemption section, there is no inconsistency between the Compact and federal or District of Columbia laws.

[22] Petitioner also asserts that it is excused from payment by Section 77 of the Compact. That section exempts petitioner

3. Finally, strong considerations of equity support the result reached below. Petitioner's payment into the special fund is the quid pro quo for its relief from

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from "all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable * * * except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect." Since petitioner never claimed exemption on the basis of that section in the courts below, the applicability of Section 77 to the particular facts of this case was not considered, and ought not to be reviewed by this Court. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975) ("without a lower court opinion on the legal issue * * * we normally decline to consider a legal claim," citing cases); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court," citing cases).

This claim is, in any event, without merit. The Section 77 exemption expressly does not apply to state and federal rules and regulations relating to inspection, safety, and testing; as the court of appeals explained (Pet. App. 16a-17a), the workers' compensation scheme, including the special fund provision, "indirectly regulates employers' conduct by holding them accountable for accidents"; it thus contributes to the safety not only of employees, but also of members of the public who use petitioner's facilities. The legislative history of Section 7 suggests it was designed to make WMATA's revenue bonds saleable by assuring its independence "with respect to fares, service and other activities which affect net revenues" (*Malone* v. *WMATA*, 622 F. Supp. 1422, 1428-1429 (E.D. Va. 1985) (quoting testimony of Jerome Alper, counsel to drafters of WMATA Compact)). That purpose would not be served by exempting petitioner from workers' compensation laws, and thus exposing it to the risk of potentially enormous, and largely unpredictable, tort liability for accidental injuries or death of employees. Moreover, Section 80 of the Compact establishes that petitioner "shall be liable for its contracts and its torts." Petitioner has always maintained that it is covered by the Longshoremen's Act, thereby achieving the substitute for tort liability provided by the Act,

the obligation to pay full workers' compensation benefits to its employees who suffer second injuries, and more fundamentally, for its relief from potential tort liability for its employees' injuries.

Petitioner seriously mischaracterizes the role of the special fund in the statutory workers' compensation scheme, when it contends (Pet. 17-20) that the special fund has no role as a substitute for tort liability. Section 8 of the Longshoremen's Act, 33 U.S.C. (1982 ed.) 908, defines the amount of compensation to be paid for different degrees of disability. Section 8(f), 33 U.S.C. (1982 ed.) 908(f), also relieves the employer from part of the compensation it would otherwise have to pay in "second injury" cases, transferring to the special fund, after 104 weeks, payment of the remaining disability compensation for which the employer would otherwise be responsible. See pages 3-4; *supra*. See also 33 U.S.C. (1982 ed.) 944(j). Sec-

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so that any claim of exemption from regulation is inconsistent with its own conduct. *Malone* v. *WMATA*, 622 F. Supp. 1422 (E.D. Va. 1985), which petitioner cites for the proposition that it is broadly exempt from regulation (Pet. 12-13), observes that petitioner's compliance with the Virginia workmen's compensation laws "has no bearing on" whether other forms of regulation are precluded by Section 77 because the state workmen's compensation statute "is basically a tort statute which under Section 80 the authority [petitioner] has acknowledged it will honor." 622 F. Supp. at 1429 n.10. Finally, Section 66(e) of the Compact expressly provides that employees of private transportation systems acquired by petitioner shall not be "placed in any worse position with respect to workmen's compensation" as a result of the transfer of their employment to petitioner. Those employees thus continue to be covered by workmen's compensation. It would be impractical and inequitable to have such coverage turn on the individual's employment history; Section 66(e) thus strongly suggests that all petitioner's employees are covered.

tions 4 and 5, 33 U.S.C. 904, 905, guarantee that payments under Section 8, as well as Sections 7 and 9 (see page 3, *supra*), will be made to the injured employee irrespective of the employer's fault and, in exchange, provide that such payments are the employee's exclusive remedy against the employer. This substitution of guaranteed compensation for tort responsibility, the "compromise at the heart of workers' compensation" (*Washington Metropolitan Area Transit Authority* v. *Johnson*, 467 U.S. at 932), applies to the entire period of disability compensation to which the worker is entitled, regardless of whether the payments are made by the specific employer for whom the employee worked at the time of the disabling work-related injury, or by the special fund under the transfer of payment provisions of Section 8(f). After the 104-week period, the disabled employee remains entitled to payments and the employer remains immune from a tort suit. The purpose of the Section 8(f) transfer of payment to the special fund is simply to spread the cost of full statutory compensation for "second injuries" among all employers having workers' compensation liabilities under the Act, so that employers will not refuse to hire a disabled worker out of fear that the worker's existing disability will lead to inordinate compensation liabilities in the event of a later accident. Pet. App. 4a; see *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. at 201-202.

Absent these interconnected provisions, petitioner would be liable for all torts committed in the operation of its transit system resulting in personal injury to its workers. Since petitioner accepts the statutory release of its tort liability for pre-July 26, 1982, industrial injuries, including the Section 8(f) limitation of its obligation to pay in "second injury" cases,

it cannot escape its attendant obligation to pay its share of the expenses of compensating these "second injury" workers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 86-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
Petitioner,

v.

WILLIAM R. BROCK, Secretary of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICI CURIAE* OF THE COMMONWEALTH OF VIRGINIA AND THE STATE OF MARYLAND IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether an Interstate Compact entity exempt from all taxes and assessments and most regulations as a matter of federal law may properly be held liable to pay assessments levied by the District of Columbia into a "Special Fund" created by the D.C. Worker's Compensation Act to benefit certain D.C. employees.

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IN THE

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OCTOBER TERM, 1986

No. 86-1080

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICI CURIAE* OF THE COMMONWEALTH OF VIRGINIA AND THE STATE OF MARYLAND IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICI

The Commonwealth of Virginia and the State of Maryland are signatories to the Washington Metropolitan Area Transit Authority Compact. Pub. L. No. 89-774, 80 Stat. 1324 (1966), as amended by the National Capital Transportation Act of 1972, Pub. L. No. 92-517, 92nd Cong., 2nd Sess., (1972), and the

Metro Transit Police Act of 1976, Pub. L. No. 94-304, 94th Cong., 1st Sess., (1976). *See* 1966 Va. Acts Ch. 2, *referenced at* Va. Code Ann. § 56-529 (1986); 1965 Md. Laws Ch. 869, *codified at* Md. Transp. Code Ann. § 10-204 (1977). The Compact created the Washington Metropolitan Area Transit Authority ("WMATA") as the interstate agency and instrumentality of Virginia and Maryland, as well as the District of Columbia. It invested and charged WMATA with responsibility for constructing, operating and maintaining a rail transit system and operating and maintaining comprehensive bus service for the people of the greater Washington area on behalf of the signatories. Virginia and Maryland have a continuing role in the construction, operation and maintenance of the rail transit system (Metrorail) and the operation and maintenance of bus service (Metrobus) through their representatives on the WMATA Board. Each signatory to the Compact also makes capital contributions to match federal appropriations for the capital construction program. In addition, signatories make contributions to WMATA's operating budget, from which WMATA pays damage awards and claims under the workers' compensation programs of all three jurisdictions.[1] The decision below, which requires WMATA to pay assessments into the special fund of the Longshoremen's And Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*, (1982) (LHWCA) as it is applied through the District of Columbia Workers' Compensation Act (DCWCA), has a serious

[1] The suburban Virginia communities served by Metrorail and Metrobus also make substantial financial contributions to its operation.

and adverse financial impact upon Virginia and Maryland.

Besides a financial impact, the Commonwealth of Virginia and the State of Maryland have a governmental interest in having the Compact interpreted with uniformity and in accord with its specific language. The decision below, if not successfully challenged, portends other attempts to affect WMATA, a delicate, but heretofore effective, multi-state instrumentality of government and disregards several provisions of the WMATA interstate compact.

Consideration by this Court of the important federal question presented in this case is therefore of substantial interest to both States. *Cuyler v. Adams*, 449 U.S. 433, 438 (1980).

Unless the decision below is reversed, WMATA will be subjected to substantial taxes by the DCWCA Special Fund Assessment. The signatories and the residents of both states will be deprived of the benefit of WMATA's tax exemption and millions of dollars intended for funding direct operating costs will be diverted into the Special Fund to pay for work-related injuries incurred by employees of private employers subject to the DCWCA.

REASONS FOR GRANTING THE WRIT

A. The Wording of the Compact

The plain language and meaning of the Compact, particularly Sections 78 and 77, has been disregarded by the Court of Appeals in the decision below.

Section 78 of the Compact provides that WMATA "*. . .shall not be required to pay taxes or assessments*

upon any of its property, acquired by it or under its jurisdiction, control, possession or supervision or *upon its activities in the operation and maintenance of any transit facilities*. . .[Emphasis added]."

Section 77 of the Compact provides that WMATA ". . .shall, in connection with the performance of such [transit] service, be exempt from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and persons, except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect. . ."

Notwithstanding the Compact language, the court below declined to find the assessments made by the Secretary to be taxes, but found them to be "user fees", or a "mechanism" of the workers' compensation program which it deemed to be a regulatory scheme.

The Signatories to the Compact at Issue Here Intended WMATA's Tax and Regulatory Exemptions to Be Interpreted Broadly.

Introduction

The State of Maryland and the Commonwealth of Virginia, at the behest of the federal government, first negotiated and then approved the WMATA Compact. National Capital Transportation Act of 1960, Pub. L. No. 86-669, § 202, 74 Stat. 537 *as amended by* National Capital Transportation Act of 1965, Pub. L. 89-173, § 7, 79 Stat. 666; S. Rep. No. 1491, 89th Cong., 2d Sess. 2-3 (1966); H.R. Rep. No. 1941, 89th Cong., 2d Sess. 3-4. (1966). Representatives of the federal government, the state of Maryland and the

Commonwealth of Virginia, and the District of Columbia spent five years "giving and taking and finally hammering out . . . a compact." *District of Columbia Area Transit Compact: Hearings Before Subcommittee No. 3 of the Committee on the Judiciary of the House of Representatives*, 89th Cong., 2d Sess. at 136 (1966) (Statement of Charles R. Fenwick). In fact, the Executive Branch of the federal government delayed transmitting the Compact and consent legislation to Congress for four months to allow all parties to reconcile any differences between themselves. *Id.* at 95 (Statement of Phillip S. Hughes). *See also Id.* at 77-78, 117-18 (Statements of Howard W. Smith and Walter J. McCarter, respectively). The precise terms of the Compact, including the tax exemption misinterpreted by the court below, were a product of negotiation and compromise among the signatories and the federal government.

Exemption From Taxation Per The Compact

Maryland and Virginia would not and did not agree to have the funds they dedicated to mass transit purposes diverted to tax or regulatory schemes. Rather, all the signatories intended to exempt WMATA from all taxes and assessments such as the DCWCA Special Fund Assessment. Otherwise, WMATA would have been subjected to competitive taxation and inconsistent regulation. As the courts have recognized, that result would negate the Compact, ignore its legislative history, and divert public funds supplied by the signatories and the federal government through construction and operating assistance grants from mass transit construction and operation to other purposes.

WMATA's tax exemption covers all taxes and assessments imposed on its property, activities, reve-

nue, and other income by the federal government, any signatory, or any municipal or local taxation. Pub. L. No. 89-774, § 78, *codified at* D.C. Code Ann. § 1-2431(78) (1981 ed.). Both the Senate and House of Representatives understood that this Compact provision was an exemption from *all* taxes and assessments of whatever nature or source. H.R. Rep. No. No. 1914, 89th Cong., 2d Sess. at 18 (1966); S. Rep. No. 1941, 89th Cong., 2d Sess. at 19 (1966).

The opinion below requiring WMATA to pay the Special Fund assessments subverts the intent of the signatories and Congress and harms WMATA, the taxpayers in the affected states, and WMATA's bondholders. WMATA must take necessary financial resources away from its primary function of transportation to pay these consistently growing assessments. Court of Appeals Joint Appendix 176-78. The money can only be raised by a diversion of revenue or an increase in funding by the local jurisdictions. It is improper to require the taxpayers of one state to involuntarily subsidize the worker's compensation benefits of private employers in another state. In short, citizens of one state are being taxed for the benefit of citizens of another state. Thus, forcing WMATA to pay the Special Fund assessment is a breach of faith between the federal government, the respective signatories to the Compact, the local citizens involved, and WMATA's bondholders.

Exemption From Regulation Per The Compact

Congress and the signatories to the Compact recognized that competing levies on the funds of WMATA were not the only way to damage WMATA's primary goal of providing mass transit services. Com-

peting and conflicting regulation would also lead to this undesirable result. WMATA's exemption from signatory laws was carefully drawn to limit the application of inconsistent laws and regulations:

> Except as otherwise provided in this Title, any transit service rendered by transit facilities owned or controlled by the Authority and the Authority or any corporation, firm or association performing such transit service pursuant to an operating contract with the Authority, shall, in connection with the performance of such service, be exempt from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and persons, except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect; provided, however, that the Board may promulgate regulations for the safety of the public and employees not inconsistent with the applicable laws, rules, regulations or orders of the signatories and of the United States.

Pub. L. No. 89-774, § 77. That Congress intended to make this a very broad exemption from regulation is clear from the colloquy between Representatives Basil Whitener of North Carolina and Herbert Tenzer of New York during the floor debate. Rep. Whitener questioned the propriety of granting such a broad exemption. Rep. Tenzer replied that the exemption was required to ensure the marketability of WMATA bonds and to prevent WMATA from becoming an agency unable to function due to conflicting regula-

tions. The House then defeated Rep. Whitener's amendment deleting Section 77 of the Compact. 112 Cong. Rec. 25,682 (1966).

Two District Courts have interpreted Section 77 of the Compact. In each instance, the state law in question was deemed to fall to the Compact's language. Most recently, the Eastern District of Virginia court ruled that Virginia's Right to Work statute was not applicable to WMATA. Relying in part on Section 77 of the Compact, the court found:

> This exemption from regulation has been strictly constructed with the courts holding that the plain language of the statute provides that an individual signatory is prohibited from unilaterally subjecting [WMATA] to any legal burden or duty not specifically established by the Compact.

Malone v. WMATA, 622 F. Supp. 1422, 1428 (E.D. Va. 1985). The court quoted from the legislative history of § 77 as follows:

> With respect to Section 77, dealing with regulation, exemption from the separate regulation of the several signatories and the United States is essential. This is necessary not only to avoid conflicting standards of regulation but in order to make the revenue bonds of the Authority saleable. The investment market will insist that the Authority be entirely self-regulating with respect to fares, service and other activities which affect net revenues. This is a practically universal requirement in all revenue bond financing. Hearing of House of Representa-

> tives, Committee of the Judiciary, Subcommittee Report No. 3, 89th Cong., 2nd Sess., H.J. Res. 1163, July 20, 27, August 3, 1966, p. 235. *Accord* Senate Report 1491, Calendar No. 1457, p. 22, 89th Cong., 2nd Sess., August 24, 1966.

Id. at 1429. The result of the Court of Appeals' decision negates this granted exemption from the separate regulation that Congress thought essential.

The District Court for the District of Columbia in an unreported decision (Appendix A) ruled that WMATA is not subject to the District of Columbia Human Rights Act of 1977. *Gay Activists Alliance of Washington, D.C., Inc. v. WMATA*, No. 78-2217 (D.D.C. July 5, 1979).

Two other District Courts have treated uniformity under the Compact without direct reference to § 77 of the Compact. In *C.T. Hellmuth & Associates, Inc. v. WMATA*, 414 F. Supp. 408, 410 (D. Md. 1976), the court ruled that WMATA was exempt from the Maryland Public Information Act. Even though the signatories had similar laws, the court stated:

> Regardless of how similar the laws may be, plainly Maryland may not impose its preferences in this regard upon Virginia and the District, for such an imposition, however, minimal, is nonetheless an intrusion upon their interests in derogation of the Compact. Clearly then, Maryland may not unilaterally subject WMATA to the provisions of [the Maryland statute].

The rationale of the decision was that one party to a Compact cannot impose burdens upon the Compact absent concurrence of the other signatories.[2]

In *District of Columbia v. WMATA*, No. 74-1682 (D.D.C. 1975) (Appendix B), the district court discussed in dicta, relying on an analogous Compact situation reported in *Agesen v. Catherwood*, 26 N.Y.2d 521, 260 N.E. 2d. 525, 311 N.Y.S.2d 886 (1970), that § 77 of the Compact meant that the internal operations of WMATA were to be independent of the direct control of the signatory states.

While these cases are not binding upon this Court, resolution of controversies by lower federal courts are illustrative of how this Compact issue has been handled and how the court below should have ruled.

The Court of Appeals treatment of the Special Fund assessment as a regulatory fee is a return to the problems of conflicting regulation. The Court analyzed worker's compensation statutes as regulations: "the entire workers' compensation scheme, of which the Special Fund is an integral part, regulates employers' liabilities for industrial accidents. The scheme also indirectly regulates employers' conduct by holding them accountable for accidents and exacting increased contributions to the Special Fund when their proportion of direct compensation liabilities increases." *Brock v. WMATA*, 796 F.2d 481, 488 (D.C. Cir. 1986). The court concluded that the the Special Fund was part

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[2] WMATA has declined to pay to the Industrial Commission of Virginia the tax authorized to be collected under 65.1-129 of the Code which incorporates 65.1-139 (Second Injury Fund) and 65.1-147 (Uninsured Employer's Fund) on the same grounds that it advanced before the court below and to this Court.

of the regulation of the workers' compensation field. Consequently, the Special Fund assessment was a fee attendant to that regulation.

WMATA, however, is exempt under Section 77 from both state and federal regulation in all fields except safety and testing of facilities. Thus, the court's decision violates both the letter and spirit of the intent of Congress and the signatories in consenting to the WMATA Compact regarding competing regulation of WMATA.

B. Intergovernmental Immunity from Taxation

The principle of intergovernmental immunity from taxation has been incorrectly and in a strained fashion distinguished away by the Court of Appeals in the decision below.

To the extent the tax or assessment in question is not that of the United States, it is a tax or assessment of the District of Columbia, one of the signatories to the Compact. If the tax or assessment is thought to be that of the United States, Congress agreed for the United States that WMATA would not be subject to federal taxation.

By holding that the Special Fund assessments—no matter how burdensome and without reference to their disproportionate relationship to any benefit received by WMATA—are not taxes or assessments, the court below has disregarded not only the plain language of the Compact and its legislative history but the sovereign immunity enjoyed by WMATA as an instrumentality of Maryland and Virginia.

1. WMATA Shares the Sovereign Immunity of the Signatories from Federal Taxation and is Accordingly Exempt from the Special Fund Assessment.

WMATA shares the sovereign immunity of its signatories. By the terms of its congressionally sanctioned Compact, WMATA is an "agency and instrumentality of each of the signatory parties". Pub. L. 89-774, §§ 1(d), (e) and 4, *codified at* D.C. Code Ann. § 1-2431 (1d, e), (4) (1981 ed.). The Compact further provides at Section 78 that WMATA is "engaged in an essential government function." The obvious purpose of the signatories in adopting these provisions was to confer their sovereign immunity upon WMATA. The courts which have considered the issue have reached a similar conclusion. *Morris v. WMATA*, 781 F.2d 218, 222 (D.C. Cir. 1986); *Potomac Electric Power Co. v. State Corp. Comm'n*, 221 Va. 632, 635, 272 S.E.2d 214, 215 (1980). Neither the court below nor the Secretary of Labor questioned WMATA's right to assert its sovereign immunity as a defense in this case.

As a state agency or instrumentality WMATA is immune from federal taxation. *Massachusetts v. United States*, 435 U.S. 444, 453-463 (1978).[3] The Spe-

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[3] While the court below held that the operation of WMATA's public transportation system was not a governmental function and thus not entitled to immunity from taxation, that decision is contrary to the clear intent of Congress and the signatories in adopting Section 80 of the Compact and the declaration in Section 78 that WMATA is "engaged in an essential government function." Further, this Court abandoned the governmental/proprietary dichotomy in *Massachusetts*. *See also* Va. Code § 15.1-1370 (Repl. Vol. 1981) which provides that a transportation commission will be performing an essential governmental function

cial Fund is a tax. In *Carmichael v. Southern Coke & Coal Co.*, 301 U.S. 495 (1936) this Court held that a tax is a non-consensual exaction on any group of persons for public purposes, without regard to whether the taxpayer caused the condition being remedied or benefited from the exaction, or whether the benefit from the exaction was paid to individuals. *Id.* at 518, 521, 525. This court has also described a tax as an enforced contribution for the payment of public expenses. *Houck v. Little River Drainage District,* 239 U.S. 254, 266 (1915). The Special Fund satisfies these tests. It was intended to encourage the employment of previously injured and handicapped workers by spreading the cost of their compensation for any subsequent injury among all employers. H.R. Rep. No. 1441, 92nd Cong., 2d Sess. 8 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4705-6. The Department of Labor, in the preamble to its regulations promulgated to implement the Special Fund provision, described it as follows:

> This special fund was established to give effect to a congressional policy determination that, under certain circumstances, the employer of a particular employee should not be required to bear the entire burden of paying for the compensation benefits due that employee under the Act. Instead, a substantial portion of such burden should be borne by the industry generally. . . .

20 C.F.R. § 702.144 (1986).

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in the exercise of the powers conferred upon it by the Transportation District Act of 1964, Va. Code § 15.1-1342 *et seq.* (Repl. Vol. 1981).

Thus, the signatories are being taxed to provide benefits for private employers utilizing the Special Fund.

The court avoided this issue by characterizing the Special Fund as a user fee or a regulatory fee to fit within this Court's discussion of permissible exactions in *Massachusetts v. United States*, 435 U.S. 444. In concluding that the Special Fund was a user fee, the court below ignored the requirement that such fees recover only a "fair approximation of each beneficiary's share of the cost." 435 U.S. at 460. Although the record below was clear that WMATA received less than fifty percent of the dollar value of the Special Fund assessment, the court below concluded that WMATA's benefits and costs were roughly approximate. It justified its conclusion by holding, without any supporting authority, that there need be only a rational intent to have the benefit conferred roughly approximate the amount levied in the future. *Brock v. WMATA*, 796 F.2d at 489.

The conclusion that the Special Fund is a regulatory fee is similarly flawed. As will be discussed *infra*, the Special Fund is not a part of the workers' compensation scheme. Further, even if it was, it is not regulatory in nature. As we have demonstrated above, the primary purpose of the Special Fund is generating revenue. Assessments are based on the size of the pool of carriers and self-insurers, not on any benefit WMATA receives from the Special Fund. See Va. Code § 65.1-129 (1950), as amended, which characterizes this type of exaction as a tax, not a fee.

2. The Special Fund Was Created to Serve Public Purposes and Is Not Part of the Basic Worker's Compensation Scheme.

Central to the decision of the Court of Appeals is its apparent conclusion that the Special Fund is an integral part of the workers' compensation system in the District of Columbia. As was discussed in more detail in WMATA's Petition for Certiorari, the Special Fund is not a part of the basic workers' compensation system in the District of Columbia. *Petition* p. 20. It is intended as a separate source of compensation for insured and certain other employees which is not directly related to their injuries.

The DCWCA Special Fund was intended to encourage the employment of previously injured and handicapped workers by spreading the cost of their compensation for any subsequent injury among all employers. H.R. Rep. 1441, 92nd Cong., 2d Sess. 8 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4705-6. The Special Fund also covers other costs, including those which were to have been borne by insolvent insurance carriers and self-insurers. 33 U.S.C. section 944(j)(2). The payments from the Special Fund are not directly proportional to WMATA's workers' compensation payments or to any other aspect of the basic workers' compensation scheme. Rather, the Special Fund is designed to spread certain costs secondary to actual workers' compensation payments among all its users. Viewed in this light, it clearly meets the test of *Carmichael* in that the exactions for the Special Fund are unrelated to the specific activities of the employers assessed.

Special Funds in other states are generally treated as separate and apart from the basic workers' compensation statute. *See* 2 A. Larson, *The Law of Workers' Compensation*, 59.31(a) (1982). Maryland has exempted WMATA from their respective workers' compensation special fund assessments as well as other levies that function as taxes, including unemployment taxes.[4] Virginia has sought payment from WMATA for its Special Funds, but WMATA has declined to pay it, citing § 78 of the Compact. The Maryland and Virginia special fund assessments, like the DCWCA Special Fund Assessment, are regarded as taxes. See Va. Code § 65.1-139 (Repl. Vol. 1980); [5] Md. Ann. Code art. 101, § 66(2) (Repl. Vol. 1985); *Carmichael v. Southern Coke and Coal Co.*, 301 U.S. 495; [6] *Massachusetts v. United States*, 435 U.S. 444.[7]

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[4] WMATA, like other government agencies, reimburses the signatories, including the District of Columbia, for actual costs paid on its unemployment claims.

[5] WMATA is a qualified self-insurer under Va. Code § 65.1-108 (Repl. Vol. 1980).

[6] In *Carmichael*, this Court defined a tax as any levy made on any class of persons for a public purpose where the levy does not provide the payer with any special benefit. 301 U.S. at 521-23. Assessments are a tax levied on a class of persons for a special public purpose. *Houck v. Little River Drainage District*, 239 U.S. 254, 266 (1915). *See* Appellant's Brief in the Court of Appeals at 18-28.

[7] In *Massachusetts*, this Court distinguished between a tax and a user fee, holding in pertinent part that user fees return a benefit to the payor roughly approximate in value to the amount of the exaction. 435 U.S. at 463-64.

WMATA does not contribute to these funds.[8]

Thus, without any apparent legislative support, the court below has transformed a statute which has the humanitarian goal of assisting insured workers into a regulatory scheme with an adverse financial impact on WMATA. In the process, it has imposed on WMATA and the signatories to the WMATA Compact ever growing assessments which have no connection to WMATA's operations, which will impair their financial status, and which the signatories and Congress intended to preclude.

For the foregoing reasons, and the reasons given in the Petition, this Court should grant WMATA's petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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[8] WMATA does pay the State of Maryland's annual audit fee, which is wholly devoted to defraying the state's costs to audit WMATA's Maryland workers' compensation program.

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2217

GAY ACTIVISTS ALLIANCE OF WASHINGTON, D.C., INC.,
Plaintiff,

vs.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

FILED
JUL 5 1979

MEMORANDUM OPINION

This action by plaintiff Gay Activists Alliance of Washington, D.C., Inc. (Gay Activists) against Washington Metropolitan Area Transit Authority (WMATA) challenges WMATA's decision to reject a proposed advertisement for placement on car cards inside Metro buses. Plaintiff contends that WMATA's rejection of the advertisment violates the District of Columbia Human Rights Act of 1977, D.C. Code § 2-83, and the First Amendment and Equal Protection Clause of the Constitution. This matter is before us on plaintiff's motion for partial summary judgment. The American Civil Liberties Union has filed an *amicus curiae* memorandum in support of this motion. Defendant WMATA opposes. It is agreed that there are no genuine issues of material fact. For reasons discussed below, we first hold that defendant WMATA is not subject to the District of Columbia Human Rights Act of 1977 at least insofar as this Act applies to refusals to accept the pro-

posed advertisement of the Gay Activists.[1] We further find that defendant WMATA has created a public forum for political and social advertisements and cannot consistently with the First Amendment right of free speech refuse to accept plaintiff's proffered advertisement.

I. Statement of Facts

WMATA was established as a public service agency in 1966 through a Congressionally approved interstate compact for the purpose of improving the public transportation for the national capital region. Washington Metropolitan Area Transit Authority Compact, D.C. Code § 1-1431 (1973). WMATA received appropriations authorized by Congress to finance the design, engineering, construction and equipping of its facilities. Costs beyond those borne by commuters using WMATA transit facilities are shared among the federal, District of Columbia and participating local governments.

WMATA has administered an advertising program since 1973 (Deposition of John Warrington, Tr. 27), revenues from which being tax-exempt under the WMATA compact. *Id.* WMATA accepts advertising for the interiors and exteriors of its buses, subway stations and entry ways to subway stations. *Id.* at 6-7.

It appears undisputed that WMATA has regularly accepted advertisements which promote a variety of products, services and ideas. Affidavit of Andrew Jay Schwartzman, attached to plaintiff's motion for partial summary judgment. Among those are numerous advertisements for products which may be controversial, or the advertising of which may be controversial. For example, WMATA carries advertisements for tobacco products, alcoholic beverages and race tracks. WMATA has also carried advertisements for the pro-nuclear power positions of

[1] It it therefore unnecessary to consider whether this refusal would otherwise violate the Act.

the Edison Electric Institute, for an anti-abortion group called "Birthright of Northern Virginia," for the Rape Crisis Center, and for numerous religious organizations, including several groups such as the Unification Church and the Founding Church of Scientology.

To determine whether a particular advertisement is acceptable, WMATA generally refers to a set of guidelines. Deposition of Ralph Frisbee, Tr. 7. These guidelines apply to all requests for advertising regardless of whether the advertising is intended for the interiors or exteriors of its buses, subway stations or entry ways to subway stations. The first nine guidelines set artistic standards for the submitted advertisements, and also set standards prohibiting misleading claims. Guideline 10 more generally states that WMATA should "reject or remove any advertising which it deems to be not in the public interest."

On September 22, 1979, and prior to final action on plaintiff's request, a new Guideline 11 was proposed and adopted at a WMATA Board meeting. This guideline provides that:

> Items which might be objectionable to a substantial segment of the community should be avoided. For example, advertising depicting or referring to undesirable social behavior, or which might be offensive because of racial or religious preferences should be avoided. Copy which might be contrary to the best interests of the transit systems, or which might result in public criticism of the advertising industry and/or transit advertising will not be accepted.

The present controversy has its origin on March 21, 1978, when the Gay Activists filed a written request for advertising space. The proposed advertisement contains several photographs of Washingtonians displayed against a family photograph album page. A caption below this album contains the message, "Someone in Your Life is

Gay." Gay Activists is identified as the sponsor in a credit line at the bottom of the poster. Initially the request was made for public service (*i.e.*, reduced rate) advertising. Later the request was amended to include a request for commercial space. WMATA considered the advertisement for public service and commercial space.

Four WMATA officials participated, to varying degrees, in the decision whether to accept or reject the Gay Activists' advertisement: Mr. John Warrington, WMATA Director of Marketing, Mr. Ralph Frisbee, Head of Merchandising Branch in WMATA Office of Marketing, Mr. Theodore Lutz, then General Manager of WMATA and Mr. John C. Swanson, attorney in the WMATA Office of General Counsel.

Mr. Warrington was primarily responsible for making the decision to accept or reject the advertisement because the advertisement was "out of the norm." Mr. Warrington relied upon the advice of in-house counsel, Mr. John C. Swanson, to determine whether to accept or reject the advertisement. On the basis of the legal memorandum received from Mr. Swanson and Mr. Warrington's "cumulative sense" of the ten existing Guidelines, Mr. Warrington made his decision to reject the advertisement. Mr. Lutz, WMATA's General Manager and the person who ultimately approved the decision to reject the Gay Activists' advertisement, had also tentatively decided that, under the ten existing Guidelines, the advertisement was not acceptable.

On September 15, 1978, some six to seven months after plaintiff's original request for space, plaintiff's counsel wrote Mr. Lutz stating that if WMATA did not soon make a decision concerning the advertisement, plaintiff would have no option other than filing a lawsuit to require that a decision be made. On September 23, 1978, WMATA adopted Guideline 11 which generally proscribed advertisements which were "objectionable to a substantial seg-

ment of the community." Two days later, on September 25, 1978, WMATA notified the Gay Activists that its advertisement had been rejected. This present action was then filed on October 25, 1978 in the Superior Court for the District of Columbia, and, upon defendant's motion, removed to this Court on November 24, 1978.

II. Applicability of District of Columbia Human Rights Act

Section 231(a)(1) of the D.C. Human Rights Act of 1977, D.C. Law § 2-38, prohibits, *inter alia*, the denial to any person the "services, facilities, privileges, advantages and accomodations" of any place of public accommodation based on sexual orientation. Plaintiff alleges that defendant's refusal to accept the advertisement is a violation of this provision of the Act. Defendant in effect argues that it is unnecessary to decide whether the refusal violates the Act because the Human Rights Act of 1977 does not apply to WMATA. We agree with the defendant.

WMATA was established on February 10, 1967 by an interstate compact among Maryland, Virginia and the District of Columbia. Pub. L. No. 89-774, approved November 4, 1966. The terms of this compact provide no basis for inferring that the states and the District of Columbia intended WMATA to be bound by the provision of the District of Columbia Human Rights Act which is at issue in this litigation. Title III, Article VI, § 77, to the contrary, contains a general exemption "from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and person, except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect. . . ." Section 77 and section 75, which requires compliance with the traffic laws of the signatories, jointly exempt WMATA from all states and local laws except those relating to traffic and safety. This broad exemption is only qualified by section

80 of the interstate compact. This section provides that "[t]he Authority shall be liable for its contracts and for its torts . . . committed in the conduct of any proprietory function in accordance with the law of the applicable signatory . . . ."

The formation of an interstate compact involves a carefully limited delegation of power. *West Virginia ex rel Dyer v. Sims*, 341 U.S. 22 (1951). This delegation connotes a limited surrender of sovereignty in a manner which is designed to promote the objectives of the contracting parties. *Delaware River and Bay Authority v. Carello*, 222 A.2d 794 (1966). Those objectives, such as the establishment of a metropolitan regional transit authority here, could be readily undermined if the entity established by the compact were subjected to the potentiality conflicting laws of the contracting parties. In this case, plaintiff would subject the compact entity WMATA to a District of Columbia Human Rights Law Provision barring discrimination on the basis of sexual orientation. This provision, so far as we can determine, has no counterpart in the laws of Maryland or Virginia and may in fact be contrary to the laws of these states. Absent some indicia of assent to this provision by the states of Virginia and Maryland, it cannot be said that this provision encompasses the sort of tort for which WMATA may be liable under section 80 of the interstate compact. *Cf. Delaware River and Bay Authority v. New Jersey Public Employment Relations Commission*. 270 A.2d 704 (1970) (no assent to labor relations law of one contracting state). Section 231(a)(1) of the D.C. Human Rights Act therefore falls within the general class of laws from which WMATA is exempt under the terms of the compact. *See, e.g., C. T. Hellmuth v. Washington Metropolitan Area Transit Authority*, 414 F. Supp. 408 (D. Md. 1976). We accordingly hold that WMATA cannot be liable for the allged violation of the D.C. Human Rights Act of 1977.

III. Constitutionality of Refusal to Accept Advertising

A. State Action

Defendant contends that its decision to refuse plaintiff's advertisement, being a private or proprietary act, did not involve state action and was therefore beyond the reach of the First, Fifth and Fourteenth Amendments.[2] This contention, however, is clearly contrary to the Supreme Court's decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, the Supreme Court squarely held state action is present when a city leases advertising space on public buses even though this leasing is a commercial venture incidental to the provision of public transportation. 418 U.S. 298, 303-04. WMATA is not a transportation system operated by a municipality such as the system operated by the city of Shaker Heights, Ohio. Instead, WMATA is a regional instrumentality created by the states of Maryland, Virginia and the District of Columbia. However, there is no constitutionally significant difference between the advertising decisions of a transportation system operated by a municipality and the advertising decisions of a transit system operated by an instrumentality created by an interstate compact. *See, e.g., Moskowitz v. Cullman*, 432 F. Supp. 1263, 1266 (D.N.J. 1977). Decisions of both types sufficiently implicate the state. Defendant therefore engaged in state action when it rejected the proposed advertisement of the Gay Activists.

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[2] The First Amendment right of free speech at issue in this litigation is applicable to states through the Fourteenth Amendment. Since the District of Columbia is not a state within the meaning of the Fourteenth Amendment, Bolling v. Sharpe, 347 U.S. 497, 499 (1954), First Amendment rights are made applicable to the District of Columbia through the Due Process Clause of the Fifth Amendment. Public Utilities Commission v. Pollack, 343 U.S. 451 (1952). In either case, there must be a sufficient governmental nexus or state action, in order for a state or the District of Columbia to be held to the standards of the First Amendment.

B. Access to Public Forum

(1) First Amendment Principles

The basic First Amendment issue presented in this action is whether defendant WMATA has created a public forum for speech concerning the social issue of homosexuality by accepting other forms of advertisements concerning concerning controversial subjects. If defendant has created such a forum, access to that forum can generally be limited only by regulations controlling the time, place and manner of speech. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 98 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). These regulations must be narrowly tailored to serve a substantial governmental interest. *Niemotko v. Maryland*, 340 U.S. 268 (1951). Regulations which discriminate among different types of speech, where a public forum has been created, on the basis of the content of the message cannot generally withstand this sort of scrutiny. *See, e.g., Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632, 639-40, n. 9 (D.R.I. 1976); *Lawrence University Bicentennial Commission v. City of Appleton, Wisconsin*, 409 F. Supp. 1319, 1323-24 (E.D. Wis. 1976).

2. Traditional Forum

The Supreme Court in *Lehman v. City of Shaker Heights, supra*, determined that the interior of a bus is not a traditional public forum for political speech. The Court found that the interior of a bus was not analagous to an open space, meeting hall, park, street corner or public thoroughfare which were historically used as settings for the public expression of ideas. *Id.*, 418 U.S. at 303. Instead, the interior of a bus harbors a captive audience which is unwillingly subjected to potentially offensive and intrusive messages. The commuter bombarded by those messages

may temporarily avert his gaze but the manipulative skills of the advertiser are invoked to continually thrust a particular product, life style or viewpoint before the eyes of the captive commuter. In *Lehman*, the Court sustained the ban on political advertising by a municipal transit system which had barred all political advertising but pointed out that because state action exists, "the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious or invidious." *Lehman v. City of Shaker Heights, supra*, at 303. In this action, plaintiff's claim that its advertisement must be accepted to preserve its right to nondiscriminatory access to a traditional public forum is misplaced.[3] The interior of a Metro bus is not a traditional public forum. It is clear that political and social advertisements can be excluded from a situs medium which is not a traditional public forum. This does not end our discussion.

3. Creation of Public Forum

The proprietor of what is otherwise not a traditional public forum may open the door to all forms of constitutionally protected[4] social or political speech by the acceptance of other constitutionally protected social or

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[3] Because of our subsequent holding that defendant has created a public forum for controversial social advertisements on the *interiors* of buses, we need not consider whether the *exteriors* of buses and advertising space on subway walls and entrances, are traditional public fora. Although plaintiffs assert that they have also sought to secure space on the exteriors of buses and in subway terminals, the record in this action only reflects an attempt to secure rental space on the interiors of Metro buses. *See, e.g.*, Letter from Mayo Lee to Thomas Brinton, March 21, 1978, attachment 5 to plaintiff's motion for partial summary judgment; Letter from Theodore C. Lutz to Leonard Graff, Sept. 25, 1978, attachment 7 to plaintiff's motion for partial summary judgment.

[4] The Supreme Court has recognized that several forms of speech are not entitled to the constitutional protection of the First Amendment. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (obsenity); Brandenburg

political speech. As noted above, the First Amendment does not authorize the selective exclusion of particular messages or viewpoints on the basis of their content. Thus, although the interiors of Metro buses are not a traditional public forum for the expression of social and political viewpoints, a city or regional transit system nevertheless may create a public forum for the advertising of social or political speech by the acceptance of other advertisements dealing with social or political issues.

4. Creation of Public Forum by WMATA

Applying these principles, it is apparent that WMATA could have rejected all advertising. WMATA, however, instead elected to accept a rather broad range of political and social advertising. Many advertisements accepted by WMATA are clearly of a controversial nature and could well be offensive to many captive bus riders. For example, WMATA has sold advertising space to the Edison Electric Institute for messages which advocate the development of nuclear power plants, to religious groups such as the International Meditation Society, the Unification Church (whose followers are referred to as "Moonies"), and the Founding Church of Scientology; to political candidates such as the communist Party nominees for President and Vice-President of the United States; to an anti-abortion group called Birthright of Northern Virginia for messages concerning non-abortion alternatives to pregnancy; even to Madame Bogard, a soothsayer. *See* affidavit of Andrew Jay Schwartzman, attached to plaintiff's motion for summary judgment.

WMATA has not only accepted such controversial advertisements but had done so without any sharply defined criteria for determining whether to accept or reject advertisements dealing with controversial political and social issues. At the time the plaintiff's advertisement was sub-

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v. Ohio, 395 U.S. 444 (1969) (words which imminently incite violence); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973) (libel).

mitted, the only applicable guideline for distinguishing among the content of proposed advertisements was Guideline 10, which states that "WMATA reserves the right to reject or remove any advertising which it deems to be not in the public interest." This vague "public interest" standard was made only slightly more specific by the belated adoption of Guideline 11 which stated that "[i]tems might be objectionable to a substantial segment of the community should be avoided. . . ." Even with this clarification, the guideline provide no intelligible standard for discriminating among different social or political advertisements. For example, WMATA has argued that its professed policy or limiting bus advertisement space to innocuous and less controversial services-oriented advertisements prompted it to reject a subsequent advertisements by the Birthright of Northern Virginia. It contends that this policy would have prompted the rejection of an advertisement by the United Jewish Appeal Federation of an advertisement captioned "Let's Talk Turkey" submitted by the Armenian National Committee, Armenian Rights Movements of America. We, however, fail to see how the broad "public interest" and "objectionable to a substantial segment of the community" guidelines permit WMATA to accept an advertisement advocating nuclear power but not one opposing abortion to accept an advertisement by the Unification Church but not one by the United Jewish Appeal; or to accept an advertisement urging voters to elect members of the Communist Party but not one urging reconsideration of United States policy toward Turkey.

WMATA undeniably has a legitimate interest in preventing its captive riders from being exposed to the plaintiff's potentially offensive advertisements concerning the controversial topic of homosexuality. Many riders will undoubtedly take umbrage at the message that "Someone in Your Life Is Gay." WMATA, however, must pursue its interest within the limits of the First Advertisement: That Amendment reflects a profound national commitment to

the principle that debate on public issues should be uninhibited, robust and wide-open. . . ." *New York Times Co. v. Sullivan*, 370 U.S. 354, 270 (1964). More specifically, that Amendment prohibits public entities such as WMATA which open up a public forum for political and social speech from discriminating on the basis of the subject matter of this form of speech. The risk of arbitrarily censoring the expression of unpopular viewpoints is particularly evident where, as here, vaguely worded guidelines vest officials with broad discretion to accept or reject proposed advertisement.

This is not a case similar to the facts of *Lehman v. City of Shaker Heights, supra.* In *Lehman*, the transit system had guidelines which clearly and unequivocally prohibited the sale of space for political advertising. In addition, "[t]here was uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system . . . had not accepted or permitted any political or public issue advertising . . . ." *Id.* at 300-01. In sharp contrast, the WMATA guidelines contain no such blanket prohibition of political or public issue advertising and WMATA has on several occasions accepted controversial political and social advertisements. As the record shows, these decisions, reflecting the personal and subjective reactions of decisionmakers were made in the absence of guidelines which are clear, precise and unequivocal.

Although we are sympathetic to WMATA's interests in raising advertising revenue and its natural desire to protect its riders from offensive messages, and to avoid public controversy, we are nevertheless compelled to hold that WMATA has run counter to the requirements of the First Amendment in its pursuit of these interests and desires,[5] WMATA has opened up a public forum for political and

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[5] In view of this disposition, it is not necessary to reach plaintiff's Equal Protection Argument.

social advertisements and cannot constitutionally exclude plaintiffs from access to that forum.[6]

An order consistent with the foregoing has been entered this day.

/s/ JOHN M. PRATT
John M. Pratt
United States District Judge

July 5th, 1979

[6] Our holding does not determine the amount of damages, if any, to which plaintiff is entitled as a result of a breach of its First Amendment rights. *See Carey v. Piphua*, 439 U.S. 347 (1978).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1682

DISTRICT OF COLUMBIA

Plaintiff,

vs

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Defendant.

FILED
MAY 14 1975

MEMORANDUM

This matter is before the Court on cross-motions for summary judgment. Plaintiff, the District of Columbia, has brought suit pursuant to D.C. Code Ann. §1-1431 (1973) on behalf of its agency, the Minimum Wage and Industrial Safety Board (the Board). It seeks a declaratory judgment that the defendant, Washington Metropolitan Area Transit Authority (WMATA) is required to make reports of injuries and death due to accident and illness pursuant to D.C. Code Ann. §36-438(c) (1973) and seeks an injunction to compel WMATA to make those reports filed with the U.S. Department of Labor and those to be made in the future available to the Board.*

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*The Board has requested that WMATA file with it copies of all accidents reported on form BEC-202 since WMATA assumed the functions of the D.C. Transit System on January 14, 1973. In addition, it has requested that WMATA fill out and return a document entitled "1973 Injuries and Illness Survey." WMATA has refused both requests. At oral arguments, WMATA volunteered to send the reports in question to the Board while disclaiming a legal duty to do so.

The Board has the duty to administer the provisions of the D.C. Code concerning industrial safety, has the power to "require employers to keep such records as it may deem advisable, and to furnish the Board with complete detailed reports relative to all accidents." D.C. Code Ann. §36-433 (1973). D.C. Code Ann. §36-438(c) (1973) provides that:

> Every employer shall submit to the Board within ten days from the date of any injury or death, or from the date that the employer has knowledge of any disease or infection resulting from any injury, a duplicate copy of the report provided for in section 430 of title 33, U.S. Code, as made applicable to the District of Columbia by sections 36-501 and 36-502.

Employers who carry on employment within the District of Columbia must file such reports, regardless of where the injury or illness occurred. D.C. Code Ann. §36-501 (1973).

The crux of the controversy is whether or not WMATA is an "instrumentality of the District of Columbia or the United States or any instrumentality thereof" within the meaning of D.C. Code Ann. §36-432(a) (1973). That section provides:

> Employer includes every person, firm, corporation, partnership, stock association, agent, manager, representative, or foreman, or other persons having control or custody of any place of employment or of any employee. It shall not include the District of Columbia or any instrumentality thereof, or the United States or any instrumentality thereof.

WMATA contends that it is specifically exempt from the provision requiring that employers file accident and injury reports because it is an instrumentality of the District of Columbia. It cites Title III, paragraphs 1(d), 2,

and 4 of the Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, approved November 6, 1966, D.C. Code Ann. §1-1431 (1973), for that proposition. Paragraph 4 states:

> There is hereby created, as an instrumentality and agency of each of the signatory parties hereto, the Washington Metropolitan Area Transit Authority. . . .

Paragraph 2 is to the same effect. Paragraph 1(d) of the Compact defines signatory as the states of Maryland, Virginia and the District of Columbia.

WMATA further argues that conflicts and inconsistencies between the Compact and any other law are resolved by D.C. Code Ann. §1-1435(a) (1973) which provides:

> All laws or parts of laws of the United States and of the District of Columbia inconsistent with the provisions of Title III are hereby amended for the purpose of this subchapter by the extent necessary to eliminate such inconsistencies and to carry out the provisions of this subchapter and Title III and all laws or parts of laws and all reorganization plans of the United States are hereby amended and made applicable for the purpose of this subchapter to the extent necessary to carry out the provisions of this subchapter and Title III.

The District of Columbia cites another paragraph of that same Compact, in support of its position. Paragraph 77 exempts WMATA from certain laws except those relative to safety. It provides:

> Except as otherwise provided in this Title, any transit service rendered by transit facilities owned or controlled by the Authority and the Authority or any corporation, firm or association performing such transit service pursuant to an operating

> contract with the Authority, shall, in connection with the performance of such service, be exempt from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and persons, *except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect*; provided, however, that the Board may promulgate regulations for the safety of the public and employees not inconsistent with the applicable laws, rules, regulations or orders of the signatories and of the United States. (Emphasis supplied)

It contends that the word "safety" as used in paragraph 77 should be given its ordinary and everyday construction. That is, it covers the laws and regulations guaranteeing the quality of safety within the province of the Minimum Wage and Industrial Safety Board. In reply, WMATA argues that paragraph 77 clearly does not permit the District of Columbia to usurp the rule-making functions relating to safety of the public reserved to WMATA.

The District of Columbia asserts that the filing of accident reports with the Board is necessary in order that the Board may take part in consultations with the Assistant Regional Director for Occupational Safety and Health of the Department of Health, Education and Welfare concerning specific areas of safety problems for which the Occupational Health and Safety Act of 1970 (OSHA), 29 U.S.C. §§651-78 (1970), has been made applicable. WMATA states that the Department of Labor itself has recognized that WMATA is not an employer within the meaning of OSHA Act, 29 U.S.C. §652(5) (1970), and is therefore not subject to OSHA jurisdiction. This, of course, is not a judicial determination. The definition of "employer" in the two acts is different. *Compare* D.C. Code Ann. §36-432(a) (1973) *with* 29 U.s.c. §652(5) (1970). De-

spite this, WMATA contends that the exclusions contained within each definition are basically the same where one excludes instrumentalities and the other excludes political subdivisions from the definition of employer.

The issue before the Court is one of first impression. The starting point of the analysis must be the statute itself. *March* v. *United States*, 506 F.2d 1306, 1313-14 (D.C. Cir. 1974). The plain meaning of paragraphs 2 and 4 of the Compact is that WMATA is an instrumentality of the District of Columbia. There is a paucity of judicial interpretation of the Compact which would aid in the resolution of the controversy. In *The Bootery Inc.* v. *WMATA*, 326 F. Supp. 794 (D.D.C. 1971), Judge Parker stated that WMATA was "merely an agency of each of the signatory parties including the United States on behalf of the District of Columbia." 326 F. Supp. at 798-99. The Court finds that WMATA is an instrumentality of the District of Columbia within the meaning of D.C. Code. Ann. §36-432(a) (1973).

The Court is not persuaded that paragraph 77 of the Compact requires reporting to the Board. *Agesen* v. *Catherwood*, 26 N.Y.2d 521, 260 N.E.2d 525, 311 N.Y.S.2d 886 (1970) is closely analogous to the case at bar. In *Ageson*, the Court of Appeals of New York held that the Port of New York Authority, a public authority created by a compact between New York and New Jersey, was not subject to New York's prevailing rate of wage legislation. It stated that the wage law was inapplicable because the Compact reflected a general intent that the internal operations of the Authority would be independent of the direct control of either state acting without the concurrence of the other. While *Ageson* may be confined to its own facts since it involves interpretation of the Port Authority Compact and New York law, it is useful in its general analysis of the relationship between an individual state's law and a compact between that state and another.

Plaintiff urges as persuasive, dicta which states that the Port Authority would surely be subject to New York's laws involving health and safety, insofar as its activities externally affected the public. *Ageson* v. *Catherwood*, *supra*, 26 N.Y.2d at 525, 260 N.E.2d at 526-27, 311 N.Y.S.2d at 888. Yet this reference is not supportive of the District's position. In this case, the reports sought concern the injuries of WMATA employees only and do not function as a reporting device for injuries and property damage to the public at large.

Judgment must therefore be entered for the defendant.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

DATED: May 15, 1975

Supreme Court, U.S.
FILED
APR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
Petitioner,

v.

WILLIAM R. BROCK, Secretary of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Reply to Brief for the Respondent in Opposition

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WILLIAM R. BROCK, Secretary of Labor
Respondent.

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent Secretary of Labor ("the Secretary") mischaracterizes the nature of the District of Columbia Workers' Compensation Act (DCWCA), Pub. L. 70-419, 45 Stat. 600 (1928),[1] in general, and specifically the Special Fund, which was created by Congress to encourage the employment of previously injured individuals. This mischaracterization appears to have been done to avoid the problems raised by Section 77 of the WMATA Compact, Pub. L. 89-774, *codified at* D.C. Code Ann. § 1-2431(77) (1981 ed.).[2]

[1] The terms of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) are incorporated into the DCWCA. The statute is codified at 33 U.S.C. §§ 901 *et. seq.*

[2] The Secretary states that WMATA never argued below that Section 77 barred the Special Fund assessment and therefore the issue cannot be raised here. Resp. Br. at 15-16 n. 22. Such is not the case. WMATA mentioned that issue in its Cross-Motion For Summary Judgment before the District Court. *See*

The Secretary argues that the Special Fund is part of the basic compensation provisions of DCWCA. Further, he contends that the DCWCA is a safety statute not barred by WMATA Compact § 77. Resp. Br. at 15-16 n. 22, 17-18. Both assertions are incorrect.

The basic compensation provisions are at 33 U.S.C. §§ 907-909. In return for paying the benefits set out in those sections, the employer is given immunity from any tort action by the employee and arising out of the compensable injury. 33 U.S.C. § 905(a). Benefits provided under the DCWCA to the injured worker are neither increased nor reduced by the possible invocation of the Special Fund provisions by the employer. The purpose of the DCWCA is the same as that of all other workmen's compensation statutes: employees receive payment for work-related injuries without regard to who was at "fault"—and the employer receives immunity from tort actions. *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 931-32 (1984). The method by which the benefits are paid, whether it be insurance, self-insurance, even the Special Fund, are legislative funding techniques, not the purpose of the statute.

The Secretary's contention that the DCWCA is a safety statute is equally in error. If the DCWCA was

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Court of Appeals Joint Appendix 88-89, 91. At the Court of Appeals, the Secretary admitted that WMATA has a general exemption from regulation. Appellee's Br. 3. In its Petition for Rehearing, WMATA expressly argued that the Court of Appeals decision holding the Special Fund to be a regulatory fee contradicted Congress' intent in Section 77 of the Compact that WMATA be free of conflicting regulations. Court of Appeals Petition for Rehearing 1-2, 6-7. Thus, the issue is properly before this Court for resolution.

a safety statute, then the regulatory exemption of Section 77 of the Compact would not apply. Resp. Br. 16 n. 22. Respondent's brief expands on the opinion of the Court below by making the argument that the DCWCA is a regulatory safety statute; this argument is clearly erroneous. Workmen's compensation statutes are socially motivated, designed to protect the employee injured at work, whatever the cause of that injury. Professor Larson in his treatise correctly defines workmen's compensation statutes as providing a right to compensation, with the only questions being the nature of the injury and whether it was work-connected. 1 A. Larson, *The Law of Workmen's Compensation* § 2.10 (1982). Worker's compensation laws do not tie benefit entitlement to workplace safety. Other federal and state statutes are intended to ensure safety in the workplace.

In *Calbeck v. Travelers Insurance Company*, 370 U.S. 114 (1962), this Court held that the LHWCA (incorporated into the DCWCA) "was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy." *Id.* at 124. Again, the reference point is the certainty of compensation to the injured worker, not the safety of the workplace.

In fact, the only reference to a safety standard in the LHWCA is contained in Section 941. That section authorizes the Secretary to set standards and require certain equipment, to ensure the employee's work environment is safe. If the LHWCA was intended to be a safety statute, this section would be part of the basic provisions of Section 905 that give the employer immunity from tort suits in return for the payment

of benefits without regard to fault to the injured employee. Further, Section 941 itself exempts DCWCA employers such as WMATA from coverage under this section. 33 U.S.C. § 941(g).

In summary, the Special Fund has its own purpose, described more fully in our petition for certiorari at 17-20, which is distinct from the basic purpose of the statute. It is not a safety statute. Thus, Section 77 of the Compact, a vital part of the contract between the signatories and enacted into federal law by the Congress, exempts WMATA from the Special Fund assessment, if it is characterized, as it is by the Court below, as a regulatory or user fee.[3]

A portion of the Secretary's argument that the Special Fund assessment is not a tax merits discussion. The Secretary contends that the lower courts properly held that the Special Fund assessment was a user fee and, therefore, WMATA Compact Section 78 does not exempt WMATA from its payment. Resp. Br. 11-13. The Secretary claims that a positive relationship exists between the cost and benefits to WMATA from the Special Fund even where the assessment rises due solely to other employers' withdrawal from the fund. Resp. Br. at 13. There is no logic to that position. Even assuming, *arguendo*, that the benefit to WMATA includes the indirect benefits cited by the

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[3] The Secretary's argument that Section 66(e) requires Special Fund coverage is totally misplaced. It ignores the history of Section 66, designed to protect the rights of organized transit workers upon takeover of private bus companies, and again mischaracterizes the Special Fund. That Fund has nothing to do with benefits paid covered employees. Payment, or non-payment, of the Special Fund assessment is totally unrelated to that coverage.

Secretary at page 9 of his brief, an increased assessment must be a tax. At the current assessment, WMATA is fully enjoying those benefits. Nothing more is gained by WMATA from an increased assessment. There is no rational relationship between the benefits received and the amount of the assessment. Rather, the assessments are, as the Secretary has admitted, simply a mechanism to spread the costs of the Special Fund. Consequently, the assessment is a tax, not a user fee. *Massachusetts v. United States*, 435 U.S. 444 (1978).

Finally, the Secretary should not be allowed to challenge the statistical basis for WMATA's cost benefit analysis. Resp. Br. 12. All information used in that analysis was derived from information provided by the Department of Labor. Pet. App. 9a n.7, 11a n.9. Thus, any understatement of benefits paid to WMATA claimants is solely the responsibility of the Secretary. The Court should accept the benefit amounts as stated by WMATA.

For the foregoing reasons and for the reasons stated in WMATA's Petition for Certiorari, and the *amicus* brief filed by the Commonwealth of Virginia and the State of Maryland, we ask the Court to grant the Petition.

Respectfully submitted,

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